Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

DONALD EPPERSON KILPATRICK,

Petitioner,

versus

THE STATE BAR OF TEXAS,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR A WRIT OF CERTIORARI

DONALD EPPERSON KILPATRICK
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195 pp

QUESTIONS PRESENTED

1. Whether it is arbitrary, irrational or discriminatory State Action to disbar a lawyer whose convicted conduct was authorized by printed, published, long-standing established Statutes/Disciplinary Rules, laws, case authorities, treatises and even state bar published materials?

2. Whether State bars late trial Amendment to include TEX. *Penal Code Art.* § 38.12 not in effect after petitioner had testified and after both sides had rested and after close of evidence and when Petitioner thought charge conference concluded, was failure of State to give fair notice of precise charges leveled against him in disciplinary preceding and worked violation of due process and equal protection under 14th amendment to *U.S.C.A. Constitution, Amendment 14.* And is in conflict with United States Supreme Court opinion *In Re Ruffalo,* 390 U.S. 544 (1968).

3. Will the United States Supreme Court pursuant to its inherent supervisory powers of state enforcement procedures provide analytical frame work for state lawyer disbarment cases and/or appoint a National Committee to protect or investigate arbitrary irrational and discriminatory practices of state disciplinary boards for malice, abuse of process, malicious prosecution, Rico Violations and attempts to take away or stop attorneys of this nation from collecting substantial judgments or representing U.S. citizens on issues of national importance?

4. Whether *In Re Primus,* 436 U.S. 422 (1978) offer of pro bono for free services extend to fellow lawyers assisting fellow members of Texas State Bar?

LIST OF PARTIES

The Petitioner:

Donald Epperson Kilpatrick

The Respondent:

The State Bar of Texas

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Donald Epperson Kilpatrick respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Texas Supreme Court entered in the above-entitled proceeding, on January 5, 1994. A timely Respondent's Motion For Rehearing was denied on February 2, 1994.

OPINIONS BELOW

The Opinion of The Texas Supreme Court at Tex. Sup. Ct. J. 37, p. 350, Jan. 5, 1994, and is reprinted in the appendix hereto, App. 1, *infra.*

The February 2, 1994 cover letter issued from The Texas Supreme Court overruling Respondent's Motion for

Rehearing. Enclosing corrected copy of that Court's Opinion delivered, January 5, 1994. Reprinted in appendix hereto, App. 2, *infra*.

The corrected Opinion of The Texas Supreme Court delivered February 2, 1994. Reprinted in appendix hereto, App. 3, *infra*.

The Opinion of the Fourteenth Court of Appeals, Houston, Harris County, Texas, Reversing and Remanding the judgment of the trial court for new trial. Unreported per *Tex. R. App. P.* 90. Reprinted in appendix hereto, App. 4, *infra*.

Judgment of the Fourteenth Court of Appeals finding error in the Judgment of Trial Court. Reversed and Remand the cause for proceedings in accordance with the court's opinion. Reprinted in the appendix hereto, App. 5, *infra*.

The Judgment of the 55th Judicial District Court, Harris County, Texas, Specially appointed Visiting Judge Leonard Hoffman presiding. Texas State Court Judgments are not published. Reprinted in the appendix hereto, App. 6, *infra*.

JURISDICTION

The jurisdiction of the Supreme Court to review decisions of State Courts is invoked under 28 U.S.C. §1257, as revised in the act of June 27, 1988, 102 Stat. 662.

(i.) Trial Court entered Judgment of disbarment sought to be reviewed on March 13, 1992 (App. 7, *infra*). The Fourteenth Court of Appeals reversed and remanded the Judgment of the Trial Court on May 20, 1993. The Supreme Court of Texas reversed and rendered the Judgment of the Court of Appeals on January 5, 1994. A

timely Motion for Rehearing was overruled and corrected opinion issued by Texas Supreme Court on February 2, 1994.

Petitioner relied to his detriment on State Bar Rules originally approved by Texas Supreme Court, February 22, 1940; including Amendments received through February 1, 1989[1], statutes, cases, laws, treatises and State Bar of Texas published material. As State Bar of Texas acted arbitrarily, irrationally, and discriminatorily in applying discipline of disbarment for conduct authorized and given authority by State Bar Rules, Statutes, Case Law authority, material and treatises, the United States Supreme Court has jurisdiction to examine. Based on states arbitrary, irrational, discriminatory action of disbarring Petitioner from practice of law.

The arbitrary, irrational and discriminatory conduct of the State Bar of Texas regulating lawyers deprived Petitioner of title, right, privilege or immunity specially set up or claimed under Constitution, Treaties or Statutes of, or commission held or authority exercised under, the United States as codified in 28 U.S.C., Section 1257(a). State Courts; Certiorari, permitting U.S. Supreme Court's jurisdiction to grant Writ of Certiorari.

Invoke supreme court's inherent supervisory powers to review and protect from state court's constitutional infirmities. *Peel v. Attorney Disciplinary Com.*, 496 U.S. 91, 99 (1990).

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[1] Disciplinary Rules should be treated like statutes, *O'Quinn v. State Bar of Texas*, 763 S.W. 2d 397 (Tex. 1988); *Touchy v. Legal Found.*, 417 S.W. 2d 625, 629 (Tex. Civ. App. – Waco 1967), rev'd on other grounds, 432 S.W. 2d 635, 640 (Tex. 1988); cf., *Freeman v. Freeman*, 327 S.W. 2d 428, 433 (1959). Holding Texas Rules of Civil Procedure have same force in effect as Statutes.

Throughout entire proceedings before this Court, Petitioner subjected to power of State to regulate and discipline attorneys. The State Bar of Texas arbitrarily, irrationally and discriminatorily abused its power and discretion in a way and to a degree to destroy fundamental right of what is fair and right as contemplated by due process and equal protection. *United States Constitution*, Amendment 14.

Where Petitioner attorney had no notice in state disbarment proceeding that his conduct would be considered a disbarment offense until after he testified at length, absence of fair notice as to reach of grievance procedure and precise nature of charges, deprived Attorney Petitioner of procedural due process and equal protection of the 14th Amendment of U.S.C.A. Constitution.

State's failure to give petitioner fair notice of precise charges leveled against him in the disciplinary proceeding until close of evidence and after or during charge conference conflicts with prior decision of United States Supreme Court. *In Re Ruffalo*, 390 U.S. 544 (1968).

United States Supreme Court's supervisory power should be excercised because the lower court's departure from the accepted and usual course of judicial proceedings are inconsistent with principles of right and justice invoking this Court's Jurisdiction.

The cumulative effect of the Trial Court, as well as, the State Supreme Court's application of State Evidentiary and Procedural Rules rendered Petitioner's trial fundamentally unfair and deprived him of due process and equal protection under the 14th Amendment confirming jurisdiction properly before United States Supreme Court. *Chambers v. Mississippi*, 410 U.S. 284, 290-91 (1973).

STATUTES INVOLVED

State Bar rules originally approved by the Supreme Court, February 22, 1940 including amendments received through February 1, 1989.

Texas Code of Professional Responsibility DR2-103(A) (1989.) *Recommendation of Professional Employment* (A) A lawyer shall not recommend employment as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer, . . . (Article XII, §8, renumbered as Article 10, §9, February 29, 1984, effective March 1, 1984.) Reprinted in Appendix App. 7, *infra.*

Cannon 7 – *State Bar Ethical Considerations* (1989) **A lawyer should represent a client zealously within the bounds of the law (article XII, section 8, renumbered as article 10, section 9, February 29, 1984, effective March 1, 1984.)**

(Article XII, Section 8, renumbered as Article 10, Section 9, February 29, 1984, effective March 1, 1984). State Bar Ethical Considerations, EC 7-1 (1989.) The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes disciplinary rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim issue, or defense. Reprinted in the App. 5, *infra.*

STATEMENT OF THE CASE

In 1989 Petitioner had enjoyed a personal and professional acquaintance with Bill Camp a fellow lawyer for 14 years. (S.F. 1:14-15).

Both lawyers had grown up in other cities in Texas. Both lawyers had come to Houston to practice law.

Bill first as an assistant district attorney. Later after conversation with Petitioner as a sole practitioner.

Petitioner was a sole practitioner licensed by the State Bar of Texas, December 4, 1973.

Bill Camp was licensed approximately 2 years later. Bill Camp was no stranger to Petitioner.

Bill Camp is a fourth generation lawyer, Petitioner is a first generation lawyer.

Petitioner since being licensed by the State Bar of Texas had never received grievance or formal Disciplinary Board complaint until the instant facts made basis for this Petition for Certiorari. (Court of Appeals Opinion, App. 4, p. 10). And to this present day has never had a formal Disciplinary Board Complaint made by a client.

On or about June 13, 1989, Bill Camp, was undergoing a routine barium enema at West Houston Medical Center, when he developed a vasovagal episode with a drop in blood pressure and pulse. (S.F. 1:14-15; 25-27, 32, 71, 76, 93). An attending emergency room physician, a licensed medical doctor claimed to have observed the improper procedure administered to Bill. (R.Ex. 6)

Petitioner working on a case with Hornbuckle and Montgomery, lawyers when Hornbuckle related how physician witnessed the medical procedure inflicted on Bill, the same physician Hornbuckle represented had worked with Hornbuckle, while Hornbuckle was employed at Fulbright and Jaworski and called Hornbuckle to report the omissions causing Bill's injury. (S.F.

1:26-27, 32). Mr. Hornbuckle went on to say that the physician did not want to be a "whistleblower" on the hospital or medical staff where he worked, but felt need to report to someone in authority, that Bill or his family should know. The doctor related how Bill's injury had been severe and did have some motor difficulty; that Bill's cognitive responses were intact. Bill was oriented to time and place.

Petitioner called his friend, personal acquaintance, professional acquaintances law office and was told that Bill had been discharged from the hospital and presently taking physical therapy at the rehabilitation center. (S.F. 1:36). No one at Mr. Camp's office, nor the person the Petitioner spoke to indicated that Bill was mentally incapacitated in any way (S.F. 1:37). In fact, the person at Bill's office who Petitioner spoke with Allan Cohen, indicted that Bill would welcome a visit. (S.F. 1:37). At the time of this conversation it was over a month from the date of Bill's injury. Local rehab centers in Houston, Texas, in 1989 were reported as undergoing circumstances that rendered them inherently dangerous, potential torts, assaults, rapes, both heterosexual and homosexual abuse of patients as reported in a local Houston newspaper at about the time of Petitioner's visit to his friend and fellow lawyer. (A copy is reprinted in the Appendix hereto, App. 8, *infra*).

Petitioner's state of mind was to visit his friend, fellow lawyer, personal acquaintance, professional acquaintance at what was reported potentially to be an inherently dangerous place and to advise and to disclose possible existence of evidence of acts or omissions of health care providers that potentially could manifest a proximate cause of Bill's injuries. (S.F. 1:77; 2:305).

There is no evidence in the record that the purpose of Petitioner's visit was anything else. Petitioner's state of mind was to help assist a friend, a fellow lawyer, a personal acquaintance, a professional acquaintance. That Petitioner's state of mind was were he in Bill's position he would appreciate one doing the same for him or his family.

A United States District Judge, Hon. Lynn Hughes, Judge Southern District of Texas, Houston Division testified that his belief and experience – Petitioner – "never cut a corner for a buck" that Petitioner "has never been in any position where he overreached or over charged that interest." (S.F. 1 of 1:17-22). Judge Hughes testimony is reprinted in Appendix, (App. 9, 10, *infra*). Moreover, Judge Hughes testified his belief, that it is part of a lawyer's affirmative duty to help a brother lawyer. (S.F. 1 of 1, §15:16-20) (App. 11, *infra*).

On July 19, 1989, Petitioner went to the rehab center and saw Bill. The visit occurred more than a month after the injury and Bill had come from a family of lawyers, four generations. Petitioner in good faith, belief formed a state of mind that would in no way believe that Bill would be unrepresented without counsel at the time. (S.F. 1:77-78). Bill recognized Petitioner, greeted him, performed acts of consideration and friendship and carried on normal conversation. Nothing Bill said or did indicated he did not have possession of his facilities or know what he was doing. (S.F. 1:74, 75, 76, 78)

Bill related his wife had separated from him, and was living apart (S.F. 1:103-04, 175) (App. 40) and that she had not been at Rehab to see Bill. Petitioner did not solicit Bill or ask Bill to employ him. Bill asked for Petitioner's help. Bill stated that he wanted Petitioner as his lawyer. Even adversary counsel on probate removal and a prosecution

witness at disbarment trial said that if a person in Bill's position asked for help he would help (S.F. 2:22) MacIntyre admitted Bill – needed a lawyer at that time. (S.F. 2:219). Bill at all times prior to Judge Gregory's order of removal, ratified, affirmed and acknowledged that Petitioner was his lawyer and it was his desire that Petitioner continue as his counsel. Bill made these statements to Dr. Morris, a medical doctor to which Dr. Morris swore to in an affidavit. A copy of which is reprinted in the Appendix. (App. 12, *infra*).

Petitioner, a lawyer, routinely had blank Powers of Attorney in his brief case, not an item placed specially for Bill. Bill related to Petitioner how health care providers caused his injury. Petitioner, in Bill's presence, filled in the blanks and Bill signed the Power of Attorney. Nowhere in the record is it contended that the signature was not Bill's nor that Bill did not sign the Power of Attorney (S.F. 1:72,78), not a single witness maintained otherwise, employing and appointing Petitioner as his counsel, as his advisor as his attorney to assist him in his medical malpractice case.

While visiting Bill, Bill's mother, Mrs. Barbara Camp entered the room as did an Earl Dodd. (S.F. 1:88) Bill's mother acknowledged the conversation that took place in front of Bill, with Petitioner and Bill acknowledging Petitioner was Bill's lawyer. (S.F. 1:99, 100-101) Bill's mother appeared relieved on hearing Bill had hired Petitioner as his lawyer and did not register any protest. Bill's mother, the wife of a lawyer, and mother of a lawyer seemed relieved that Bill had selected a lawyer and did not register any protest to Petitioner's employment. (S.F. 1:100) Bill's mother, it was later learned had filed contest to Susie's appointment as Temporary Guardian. Dodd not a lawyer, but one who had a history of referring big cases

to law firms in Houston, Texas, admitted that Petitioner introduced himself and that they had a conversation and that Petitioner related the incident of Bill's signing the Power of Attorney. (S.F. 1:114) Dodd, likewise on learning of this informed Petitioner. Dodd, not a lawyer, nor related to Bill, informed Petitioner he was "negotiating" with six lawyers on Bill's case, naming Richard Mithoff as one.

There is no evidence that Petitioner misrepresented anything, at any time and the fact is the evidence reveals that the earliest possible moment Petitioner fully disclosed his transaction with Bill, in Bill's presence to everyone and anyone who cared to listen.

Petitioner called Mr. Mithoff, a lawyer in Houston, Texas the next day and was unable to reach him. Another call yielded information from one of Mr. Mithoff's staff that Mr. Mithoff did not know Bill Camp and had no interest in Bill's case. Mr. Mithoff ultimately was the lawyer that settled Bill's case, the terms of which settlement were sealed by the Court.

Texas State Bar Disciplinary rules, ethical considerations supported Bill Camp's choice of Petitioner as counsel.

Petitioner contacted Ms. Susie Camp, Bill's estranged wife, at her separate place of residence. (S.F. 1:38) Susie Camp advised Petitioner at this time, the existence of the Temporary Guardianship. (S.F. 1:37, 42, 130) Petitioner told Susie Camp that Bill Camp had signed a Power of Attorney. (S.F. 1:131) There is no evidence, and it is a fact that Petitioner knew not of the Temporary Guardianship before his employment by Bill on the medical malpractice claim. (S.F. 1:68) Texas law declares statutes and cases of personal injuries to bodies of married persons are that spouse's separate property. (App. 13) Material published,

sold, and distributed by State Bar of Texas expressly stated *limited powers of a Temporary* Guardian. That the powers of a Temporary Guardian must be stated in Order of Appointment and the Temporary Guardian may not perform any acts not specifically authorized by the Court. (App. 14, *infra*) Even the state bar material questioned the constitutionality of the procedure. (App. 15, *infra*) And again in the materials distributed by the State Bar of Texas, it was stressed that the Temporary Guardian has only the powers specifically set forth in the order of the Court appointing them. (App. 16, *infra*) This was confirmed by Texas case law and case out of Judge Gregory's court, wherein a Temporary Guardianship, he appointed co-temporary guardians and placed the powers of permanent guardian on the one. A look at the order appointing Temporary Guardian. (App. 17, *infra*) The requirement of the state bar material cases and Probate Codes Statutes showed no specific conference of power authorizing Susie Camp authority over her husband's separate property personal injury unliquidated claim. (S.F. 1:80-81, 83-84) The Order affirming Temporary Guardian had not been heard, determined or signed at this time. At trial, testifying attorneys, including Court appointed Ad Litem, agreed with Petitioner's interpretation. (S.F. 1:167-168; 2:301-302) Ms. Camp's lawyer, adversary counsel on contract dispute in Probate Court, did admit, "some people take that position", "reasonable minds differ on that." (S.F. 2:212) Mr. MacIntyre, adversary counsel, even admitted that as to the reasonable minds differing on the limited duration of Temporary Guardianships. (App. 38) Likewise, Tom Edwards, present director of state bar, testified temporary guardianship order had no effect on petitioner's duty under employment contract. (App. 36)

Petitioner revisited Bill Camp at Rehab Center. He told Bill of the Temporary Guardianship. Bill said it was just to handle sale of property in New York. Bill ratified, affirmed and requested Petitioner stay on his case, help him with his medical malpractice case. There is no evidence of fee splitting agreement with Hornbuckle and Montgomery. Hornbuckle and Montgomery represented to Ms. Camp that they would represent Bill, pro bono. (App. 26) Simple agency rules align Petitioner with pro bono service. Petitioner was helping brother lawyer per state bar ethical considerations. (App. 31)

Ultimately Judge Gregory, (App. 17, *infra*) Judge of the Probate Court, No. 2, removed the suit filed by Hornbuckle and Montgomery from District Court where it was filed to Statutory Probate Court, No. 2. Judge Gregory likewise decreed, ordered Petitioner to cease visiting Bill in hospital or having any contact with him. Susie Camp hired MacIntyre from the firm of Baker, Brown, Sharman and Parker to seek Petitioner's removal from representing Bill. (Tex. R. Civ. p. 12, App. 18) The affidavit of Susie Camp to the Motion is reprinted in the Appendix hereto (App. 19, *infra*) Special attention is directed to the Affidavit where the Texas Supreme Court in their January 5, 1994, Per Curiam Opinion, Page 2, "The firm Hornbuckle and Montgomery filed a medical malpractice claim at Ms. Camp's request." Page 2 of Ms. Camp's Affidavit swears and affirms (App. 19) "that the law firm of Hornbuckle and Montgomery has never been retained by me for any purpose." Mr. MacIntyre, Susie Camp's lawyer and counsel wrote Petitioner (App. 20) suggesting relinquishment of the Contract signed by Bill. Petitioner wrote back (App. 21, *infra*) advocating wrongful interference and by way of illustration and demonstrative aide in advocating position, Petitioner stated that if Bill were receiving the

care and attention needed, Petitioner's interest upon that proof could be relinquished for $277,000. Part of the care and attention of Bill in Petitioner's mind was to have the counsel of his choice. The letter as a whole shows good faith belief that there exists a valid contract in an attempt to open dialogue pointing toward resolution the demand was made – condition precedent by care and attention Bill needed and speed of Bill's recovery. Likewise Petitioner in 18 years of practice knew full well no lawyer would pay $277,000 for personal injury claim at underdeveloped stage of Bill's case. At the time Petitioner did not know and was not aware Bill's estranged wife was demanding some form of referral fee to assign Bill's case to lawyer. (App. 30, *infra*) No one contended nor was it suggested anywhere at anytime that Petitioner was unable to prosecute Bill's case. A Hearing was conducted by Judge Pat Gregory, who declared Petitioner's contract void, Petitioner was removed from Camp's employ against Bill's expressed wishes. (App. 12) In Texas it is impossible to have a medical opinion, unless you are a doctor. Dr. Morris was the only medical opinion based upon a reasonable medical probability that Bill, though physically impaired, was mentally competent to enter into a contract to prosecute his personal interests. (App. 12, *infra*). Petitioner was entitled as a matter of state law to rely on Dr. Morris' sworn affidavit that Bill was competent, together with Bill's request that Petitioner be his lawyer in good faith belief forming state of mind that Petitioner had right and duty to represent Bill Camp.

DISCUSSION OF OTHER JURISDICTIONAL MATTERS IN STATEMENT OF THE CASE

The cumulative effect of various trial court overruling of Petitioner's objections invoking fundamental

principles of Judicial fair play were calculated to alert Trial Judge below to Petitioner's reliance on due process principals at time of trial. Examples include untimely trial amendment after all parties had rested and after what was thought close of charge conference and jury submission on Criminal Barratry Statute, Trial Court permitted language used from the Texas Criminal Statute not in effect at time of alleged conduct, there is no other law defining Barratry. Tex. Penal. Code, Ann. §38.12 (Vernon's Supp. 1992) Reprinted in the Appendix hereto. (App. 22, *infra*). The Criminal Law was amended by acts of the 1989, 71st Leg., Ch. 866, Sec. 2, Eff. Sept. 1, 1989, date of Bill's contract was July 19, 1989. The historical and statutory notes at Section 2, left it clear that the act was not to apply to any offense committed before the effective date of this act if any element of the offense occurred before that date and was highly prejudicial to Petitioner as State Bar Rules DR2-103a recommendation of professional employment excluded only non-lawyers (App. 7). The evidence is clear that the time Bill employed the plaintiff was July 19, 1989 before the effective date of the statute wrongfully used by the State Bar. They made the distinction between the former (App. 23) in referencing solicitation in a hospital and that it is a felony as opposed to misdemeanor as listed in Barratry Statute in effect at time of petitioners alleged commission. The law applicable to Petitioner is reprinted in Appendix hereto (App. 23, *infra*). A copy of Petitioner's objections at time of ex post facto conduct of trial court are reprinted in the Appendix (App. 24, *infra*).

Moreover Petitioner brought 14th Amendment due process and equal protection claims to the attention of the trial court in a timely filed *Second Supplemental Motion for New Trial*. Excerpts from that pleading are reprinted in the Appendix hereto (App. 25, *infra*). Appellant's brief in

the Court of Appeals continued to invoke fundamental principles of fair play, the excessive, abusive, arbitrary, and irrational, discriminatory nature of abridgement and reliance on 14th Amendment principles deprived Petitioner at the trial court level. The Court of Appeals opinion reversing and remanding the trial court supported and affirmed Petitioner's claims, if not specifically mentioning or addressing them in constitutional language. At page 3 of (App. 4) the Court of Appeals states . . . "We find . . . that the trial court erred in granting the trial amendment and then submitting jury question three (Barratry) (sic). Viewing the totality of the circumstances, we find that the inclusion of the question 3 in the accompanying instructions amounted to such a denial of Kilpatrick's rights as to cause the rendition of an improper judgment." Likewise the Appellate Court findings supported Petitioner's contentions of constitutional denial when the Court of Appeals held the trial court's judgment of disbarment is so heavy as to constitute an abuse of discretion.

The Texas Supreme Court violated the fundamental rights of Petitioner in misstating true facts; in violating Texas Supreme Court jurisdiction prohibition. The Texas Supreme Court by statute can review only questions of law. *Tex. Rev. Civ. Stat. Ann. Art.* 1728 (1962) in accordance with *Article V. Section 3,* of the Texas Constitution provides that the Appellate Jurisdiction of the Texas Supreme Court shall extend to "questions of law" arising in cases brought to the courts of civil appeals on appeal from judgment of trial courts. Correspondingly, *Tex. Rev. Civ. Stat. Ann. Art.* 1820 (1964) follows the wording of *Article V. Section 6* of the *Texas Constitution* which provides that the decisions of the Courts of Civil Appeals shall be conclusive of all "questions of fact."

Though the Texas Supreme Court had no jurisdiction to over facts they exercised fact jurisdiction and incorrectly wrote in their January 5, opinion (App. 1) "that two days after Petitioner obtained Camp's signature the firm of Hornbuckle & Montgomery filed a medical malpractice claim at Mrs. Camp's request." In overruling Petitioner's *Motion for Rehearing* in Texas Supreme Court, on February 2, 1994, the Supreme Court corrected (App. 2 and 3) the error but misstated the facts when they wrote "Hornbuckle & Montgomery, the firm that had contacted Kilpatrick", nowhere in Petitioner's state of mind is there in Statement of Facts or record on appeal any reference that Hornbuckle and Montgomery contacted Petitioner to contact Bill Camp (Petitioner), filed a malpractice lawsuit against the doctors who treated Camp. Those are not the facts in the record below. They are a misstatement of the facts that the Texas Supreme Court has no jurisdiction to hear or decide, and there is no evidence that Hornbuckle & Montgomery contacted Petitioner (App. 3, *infra*). Similarly the Texas Supreme Court incorrectly or wrongfully misconstrued facts about Petitioner and Bill Camp's personal and business acquaintance for over 14 years. They did mention Dr. Morris' reporting to Hornbuckle, but not that Dr. Morris gave a medical opinion binding on all lay people under Texas law that Bill was competent, but not the effect Dr. Morris' sworn affidavit would have on ones state of mind under Texas law, nor that Bill ratified and affirmed Petitioner's representation over a month after signing power of attorney. Moreover, the entire record is void of an entire word or even a scintilla about fraud, dishonesty, or deceit and the absence of the elements comprising those causes of action, not one word in the trial, or anything in the statement of facts below that could be construed as fraudulent, deceitful, or dishonest. Neither did Texas Court offer any rational or analytical

guidelines for disbarment of lawyers. Nor did Texas Court mention that there is no case in Texas jurisprudence where one has been convicted of Barratry. The version of facts in Texas Supreme Court is only the state bar's version slanted and incomplete. The state bar presented no legal authority that conflicts with Court of Appeals' opinion or challenges that court's analysis in any way. Justice Gammage has been quoted as stating the state bar asks the Texas Supreme Court to do things of questionable constitutionality. Reprinted in Appendix (App. 27, *infra*). Based on Justice Gammage's comments can there be any question that the U.S. Supreme Court grant Petitioner's Writ of Certiorari to review arbitrary irrational and discriminatory practices of Texas Supreme Court. The action of state courts is repugnant to U.S. Constitution and United States Supreme Court declaration of fundamental right, fundamental fairness, as well as granting review for arbitrary, irrational and discriminatory practices of state court disciplinary rules permitting jurisdiction of this case for Supreme Court consideration.

REASONS FOR GRANTING THE WRIT

I.

Whether it is arbitrary, irrational or discriminatory State Action to disbar a lawyer whose convicted conduct was authorized by printed, published, longstanding established Statutes/Disciplinary Rules, laws, Case Authorities, treatises and even State Bar Published Materials?

This case is of national importance. This area of the law is badly in need of the Supreme Court's authoritative voice. The decision below calls for the exercise of the Supreme Courts supervisory powers.

Nationally it is a fair characterization of lawyers responsibility in our society that they stand as a shield in defense of right and to ward off wrong. *Schware v. Board of Law Examiners of Bar Exam. of State of N.M.*, 353 U.S. 249 (1957), 77 S.Ct. 752 at p. 761.

The inalienable possession of every Citizen of free government is immunity from arbitrary power not acting by general laws or no law at all and the inviolability of private property. For the Supreme Court not to exercise its inherent Supervisory power to insure local rules are consistent with principles of right and justice; Fundamental fairness and free of Arbitrary discrimination practiced against our nations lawyers, will destroy the independence of the legal profession and sets in motion a doctrine growing as doctrines have a habit of doing to a point that renders the legal profession largely incapable of performing the service to our nations public that mostly justify its existence.

The arbitrary irrational, discriminatory nature of State interest in exercise of disciplinary power on petitioner in this case suggesting Supreme Court supervision are distinguishable facts:[2] Petitioner knew Bill Camp as a personal and professional acquaintance for 14 years, there was no prohibition under disciplinary rules against petitioner visiting Bill in Rehab Center. (App. 7) Members of Public not safe in Rehab Centers at time (App. 8) Bill a fellow lawyer and Personal and Professional acquaintance ask for petitioner's help. No evidence contrary. State Bar appears to be claiming they know the extent of Bills and petitioners thoughts perception and motivation,

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[2] *Cohen v. Hurley*, 366 U.S. 117 (1961): Fact refusal was here made a ground for disbarment, rather than for denial of admission to Bar is NOT of constitutional moment.

Petitioner may have invoked feelings of trust and security in Bill that gave Bill comfort and peace of mind. Bill had right guarnteed to have counsel of his choice. This is not a case of lawyer walking hospital corridors. Petitioner never has and never will solicit case. Petitioner from 1973 to 1979 never had client and to this day of the many many clients Petitioner represented from licensing to disbarment not one ever filed a formal complaint. How can State bar say what Bills views and beliefs forming his desire for Petitioners employment. How can Bar say what Petitioners views and beliefs towards Bill were. This Court has held in *Baird v. State Bar of Arizona,* 401 U.S. 1 (1971) Views and beliefs are immune from Bar association inquisitions designed to lay foundation for barring an applicant from practice of law. Federal Judge Lynn Hughes testified in Petitioners' Behalf at Hearing in this cause (App. 9, 10) That in Judge Hughes opinion . . . Petitioner "never cut a corner for a buck." Moreover, Judge Hughes at (App. 11 p. 49) testified further it is part of Petitioners (sic) affirmative duty to help bar. Indeed *Texas Ethical Consideration* -EC-2-18(1989) "Commendable and longstanding tradition that special consideration is given to the fixing of any fee rendered a brother lawyer or member of the immediate family." (App. 31) Adversary Counsel on Motion to Show Authority testified on hypothetical question at disbarment trial he would have responded to plea for help. (S.F. VII, 221:24, 25 222:1-25) (App. 32) Bill ask Petitioner for help as MacIntyre claims he would have done. Petitioner did.

Petitioner had briefcase with him. Petitioner was lawyer. Briefcase was part of petitioners identity, many important papers were in case.

Petitioner's motive and intent was not to sign up Bills' Case but simply to report Dr. Morriss' observations

see Bill and wish him well. Bill felt a need for petitioner's aid and assistance, Bill ask for help. The State Bar never made inquiry to nature, extent or depth of Petitioner's and Bill's relationship. Our world is beset by apprehension and fear of others. Petitioner would certify to this Court Bill knew he did not have to have that apprehension toward Petitioner.

The fact every one was negotiating Bill's case and more concerned about case than Bill (App. 30) required Bill to feel comfortable with the words Judge Hughes applied to petitioner the essence of Attorney Client relationship is trust Bill trusted Petitioner.

Bill and his wife were separated living apart. Susie Camp had not been to see Bill in a week or ten days. Petitioner reported Dr. Morris's observations to Bill. Bill was anxious to reduce proof to Admissible form. A Power of Attorney was filled out and Bill who had known Petitioner about 14 years signed. Bill's mother and Dodd came in Bill introduced Petitioner as his lawyer. Mother Camp voiced nor indicated no disapproval. Dodd not lawyer or related claimed "negotiating" with 6 lawyers. on Bills case.

Next day called Bill's wife – informed "Temporary" Guardianship pending in Judge Gregorys Court. No specific Power conferred as required by law, *Texas Probate Code* §131(a) and (b), *et seq.*, State Bar material and Cases questioning Constitutionality (App. 14, 15, 16.) Likewise Texas Cases and Statutes construed specific power not conferred not granted. (App. 33) Texas law granted Bill sole authority over his case for personal injuries (App. 13) Temporary order did not grant Susie Camp authority over Bill's case (App. 16). Likewise *Rosemont Enterprises v. Lummis*, 596 S.W. 2d 916 (Tex. App. Houston [14th Dist.] 1980 no writ) case out of Judge Gregorys Court gave good

faith Belief of Petitioner that judge Gregory had no intent to confer power over Bill's case to Susie. Hornbuckle & Montgomery filed suit (App. 17). Bill continued to ratify & affirm Petitioner Counsel of Choice (App. 12). Susie Camp hired MacIntyre, filed suit Judge removed Petitioner from Bill's case. Petitioner relied on *Texas Code of Prof. Responsibility,* D.R.2-103(A) (1989) and other disciplinary rules and *Ethical Considerations* listed in App. 35, *infra.* After Judge Gregory declared power of attorney void – MacIntrye or director for the State Bar of Texas persuaded Susie Camp to write inquiry to State Bar Grievance Committee. Then against normal procedures no recommendation was made under these facts and State Bar filed suit. Bill's case settled in sealed agreement in Judge Gregory's Court within believed eight months for considerable sum.

State Bar Proceeded to Trial Against Petitioner and though . . . purpose of rules can be substantiated when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyers self assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty. *Matter of Doe,* 801 F. Supp. 478 (D.N.M. 1992).

Tom Edwards presently director for State Bar of Texas testified for Petitioner testified as to limited powers of temporary guardianships (App. 36).

Situation Petitioner presently involved is "turf war" between district and Probate Courts (App. 37). That the existence of temporary guardianship does not negate or destroy validity of Petitioners Power of Attorney (App. 36).

Though evidence is clear Petitioners knew not of temporary Guardianship at time Bill ask for help, at trial several attorneys including Court appointed ad litem agreed with Petitioners interpretation of Probate Code (App. 38) to limited to powers conferred.

Even adversary MacIntyre admitted "some people take that position" "reasonable minds differ" (App. 39).

As Court of Appeals pointed out (App. 4 p. 30) Petitioner not convicted of a crime. He did not misappropriate moneys entrusted or embezzle client funds; fail or refuse to return client property; forge a document; or lie to a Court or grievance committee or client. Furthermore there is no evidence Petitioner has ever had a grievance filed against him much less been disciplined in his eighteen years of practice.

Texas Supreme Court's opinion factually incorrect perhaps because Texas Supreme Court has no jurisdiction over facts. Tex. Rev. Civ. Stat. Ann. art 1728 (1962) in accordance with Article V, Section 3, of the Texas Constitution, provides that the appellant jurisdiction of the Supreme Court shall extend to "questions of law" arising in cases brought to the courts of civil appeals from judgments of trial courts. Correspondingly, Tex. Rev. Civ. Stat. Ann. art. 1820 (1964) follows the wording of Article V. §6 of Texas constitution, which provides that decisions of Courts of Civil Appeals shall be conclusive on all "questions of fact".

Moreover no authority in Texas Jurisprudence to disbar attorney under these facts App. 40.

It is prayed this Court concludes state court action in interest of disciplining attorneys is applied to Petitioner under these facts arbitrary, irrational and discriminatory.

II.

Whether State bars late trial amendment to include *Tex. Penal Code Art.* §38.12 not in effect after petitioner had testified and after both sides had rested and after close of evidence and when Petitioner thought charge conference concluded, was failure of State to give fair notice of precise charges leveled against him in disciplinary proceeding and worked violation of due process and equal protection under 14th amendment to *U.S.C.A. Constitution, Amendment* 14 and is in conflict with United States Supreme Court opinion *In Re Ruffalo*, 390 U.S. 544 (1968).

At trial after close of evidence, after Petitioner had testified, after charge conference thought concluded. State Bar moved for late filed trial amendment (App. 24). For reasons objected to the trial amendment was expressly based on Criminal Barratry Statute. Tex. Penal Code Ann. §38.12(A) (Vernon Supp. 1992) and tracked language of Criminal Statute not in effect at time of Petitioners alleged misconduct (App. 22) that had language stating it was not effective at time of Petitioners alleged misconduct (App. 22) Compare statute in effect at petitioners alleged transgression (App. 23). This permitted state bar to obtain a conviction of Criminal Barratry in Civil case without "beyond a reasonable doubt" burden of proof. The Court of Appeals correctly held this prejudicial on its face objections to Barratry which was not pled were made of first and each instance mentioned in trial (App. 29) and at charge conference (App. 24).

Disbarment, designed to protect public, is a punishment or penalty imposed on lawyer. *Ex parte Garland*, 18 L. Ed. 366 (1965); *Spevack v. Klein*, 87 S.Ct. 625, 628 (1967). The lawyer is accordingly entitled to procedural due process which includes fair notice of the charge. *In Re*

Oliver, 333 U.S. 257, 223 (1948). It was said in *Randall v. Brigham,* 19 L.Ed. 285 (1869) that when proceedings for disbarment "are not taken for matters occurring in open Court, in the presence of Judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense." Therefore, one of conditions the United States Supreme Court has said to consider in determining whether disbarment by a state should be followed by disbarment is whether "the state procedure from want of notice and opportunity to be heard was wanting in due process. *Selling v. Radford,* 243 U.S. 46 (1917).

In the present case Petitioner had no notice that his actions constituted Barratry a criminal offense *Tex Penal Code art. 38.12* (1992) until after he had testified on all material facts as said *In Re Ruffalo* 390 U.S. 544 (1968) "Such procedural violation of due process would never pass muster in any normal civil or criminal litigation.

These are adversary proceedings of a quasi-criminal nature Cf. *In Re Gault,* 387 U.S. 1 (1967). The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of the testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.

How the charge would have been met had it been originally included in those leveled against petitioner by the State Bar of Texas no one knows.

This absence of fair notice as to the reach of Texas State Bar disciplinary procedures and the precise nature of charges deprived petitioner of procedural due process when due process and equal protection claims of U.S.C.A. Constitution, Fourteenth Amendment.

It is prayed the denial of due process by exercise of state interest in disciplining lawyers is so lacking in fundamental fairness procedural and substantive due process as to render proceedings void. That the Supreme Court enter order for Texas State Bar to reinstate Petitioner or alternatively the State Bar of Texas be ordered to give Petitioner a new trial with fundamental fairness and notice of all charges.

III.

Will the United States Supreme Court pursuant to its inherent supervisory powers of state enforcement procedures provide analytical frame work for state lawyer disbarment cases and/or appoint a National Committee to protect or investigate arbitrary irrational and discriminatory practices of State disciplinary boards for malice, abuse of process, malicious prosecution, Rico violations and attempts to take away or stop attorneys of this nation from collecting substantial judgments or representing U.S. citizens on issues of national importance?

While jury's provence is to determine facts, it is Trial Court's duty to decide whether facts constitute professional misconduct as a matter of law. *Hebison v. State,* 615 S.W. 2d 866, 877, Tex. Civ. App. Houston, 1st Dist. (1981) no writ. Since this is a matter of law determination it is subject to de novo review. See *Middleton v. Hawasaki Steel Park,* 687 S.W. 2d, 42, 44 Tex. App. Houston 14th Dist. (1985) writ refused N.R.E. In Petitioner's case the trial court's determinations are not supported by the record. There is no evidence that the Petitioner engaged in dishonesty, fraud, or deceit, or misrepresentation D.R. 1-102a (4); or that he engaged in conduct prejudicial to the administration of justice D.R. 1-102a (5); or that he engaged in conduct that adversely reflects on his fitness to practice law D.R. 1-102a (6); that he initiated contact

with a prospective client for the purpose employment when he knew or reasonably should know that the person could not exercise reasonable judgment in employing a lawyer D.R. 2-103d (1); that he engaged in conduct which constitutes Barratry Art. X, §7(5); that he violated a disciplinary rule DR 1-102a (1); or that he acted in violation of the code of personal responsibility Art. X, §7(1). The trial court improperly disbarred Petitioner because the excessive punishment was an abuse of discretion (App. 28) is a summation of Texas Disbarment cases with much more egregious conduct. That the United States Supreme Court under its supervisory powers set out an analytical framework within which the propriety of death penalty or disbarment sanctions could be measured. The Texas State Court case of *TransAmerican Natural Gas Corp. v. Powell,* 811 S.W. 2d 913 (Tex. 1991); that case did not deal with the "death penalty" of disbarment, but with death penalty sanction of a dismissal of a civil case for discovery abuse. In the determination of standards to guide the trial courts in the award of death penalty sanctions in civil cases, the court began with the premise that the punishment should fit the "crime." This same standard has been recognized in disciplinary cases *State v. Baker,* 559 S.W. 2d 185, 147 Tex. Civ. App. – Austin (1977) Writ refused N.R.E.

Then the state court held that death penalty sanctions in discovery abuse cases should not be awarded absent a party's flagrant bad faith or counsel's callous disregard for responsibilities of discovery under the rules *TransAmerican,* 811 S.W. 2d 917. The court also laid out an analytical framework within which the propriety of death penalty sanctions could be measured; that is, a direct relationship must exist between the offensive conduct and the sanction imposed and the Trial Judge must consider the availability of less stringent sanctions that might promote compliance.

The United States Supreme Court under its supervisory powers is here asked to provide an analytical framework for determination of the propriety of the death penalty sanction in disciplinary cases. In fact the need for such analytical framework in disciplinary cases is greater. Civil cases merely involve money damages. When a litigant loses its day in court, its only penalty is the loss of money or opportunity to recover money.

In disciplinary cases on the other hand, the loss is far greater. A lawyer faced with the death penalty sanction for misconduct loses his livelihood, his reputation, his pride, his life. The loss is professional death. There is no way to describe, and most of us can never, appreciate the grief which such death causes.

Should it come to pass state courts continue to impose this ultimate sanction on any individual, it must be ensured that the punishment fit the crime. It must be ensured that the sanction is not imposed arbitrarily without reference to standards or caselaw.

The United States Supreme Court under its supervisory jurisdiction of state disciplinary matters must ensure that once the sanction is imposed, states provide meaningful appellate review with a clear analytical framework to determine the propriety of the sanction. If not, rights of every state lawyer to practice are placed in jeopardy. Rather than to have a "I know it when I see it" standard that vacillates from Judge to Judge, we would propose some clear standards to guide courts and litigants. In the determination of the appropriate sanction for disbarment, the guiding principles should be that "punishment fit the crime."

Records should reveal the Trial Court at least considered the factors in Rule 3.10. See State Bar Rules, Art. X, §23(b) (repealed eff. May 1, 1992 except for pending disciplinary matters). To assist the public review, it would

be of assistance for the Trial Court to make fact findings and conclusions of law in the record to justify sanction imposed.

Records should also reveal that mitigating circumstances were considered, such as fact misconduct was "isolated incident", a fact that there was not a pattern of ethical misconduct that would disqualify one from practice of law; in fact that lawyer had never before been subject of a grievance. Standards should be applied on rational bases so all our nation's lawyers may spend time assisting and representing United States citizens instead of opposing special interest groups of local bars who arbitrarily, irrationally and discriminatorily inflict lawyer discipline.

In instant case there are no standards followed by Trial Court in imposition of ultimate sanction. There was no evidentiary hearing, no consideration of factors, no reference to caselaw, no consideration of mitigating circumstances, and no consideration of availability of less stringent standards. The death penalty of disbarment was imposed by Judicial fiat.

Should it come to pass that the present per curiam opinion (App. 3), is permitted to stand, there will be no standards in the future. Disbarment will be authorized for any act of misconduct and the sanction will be unreviewable by meaningful standards on appeal.

Petitioner prays the United States Supreme Court recognize there must be reasonable standards to guide Trial and Appellate Courts. Petitioner prays the United States Supreme Court find that, on this record, there is no evidence any standards were followed. Respondent further prays that this Court find that the imposition of disbarment without justification of either standards or case law, was so heavy a punishment as to constitute arbitrary, irrational, discriminatory, exercise of the State's

right to discipline lawyers. In *Cohen v. Hurley,* 366 U.S. 117 (1961), the United States Supreme Court "premise that a state may not arbitrarily refuse a person permission to practice profession. The United States Supreme Court in *Schwiere v. Board of Law Examiners,* 353 U.S. 232 (1957) of admission to bar is not of constitutional moment." There is no evidence that Petitioner was spending too much time getting clients to be incompatible with a sufficient devotion to duty lawyers owe courts. The trial court acted arbitrarily and irrationally in applying sanction of disbarment.

It is prayed the Supreme Court under its inherent supervisory powers appoint a national committee to police state disciplinary matters for malice, abuse of process, malicious prosecution, Rico Violations and wrongful takings such as does or is disbarred lawyer in process of enforcing or collecting substantial judgments, or protecting right of small group against large interest. To submit report and take appropriate action if state court violation exists. There is some slight past authority in U.S. Supreme Court for such action. *In Re Crow,* 79 S.Ct. 1152 (1959).

IV.

Whether *In Re Primus,* 436 U.S. 422 (1978) offer of pro bono for free services extend to fellow lawyers assisting fellow members of Texas State Bar?

Petitioner was employed by fellow lawyer personal and professional acquaintance, known for 14 years previous. Hornbuckle and Montgomery filed suit and represented to temporary guardian they would represent Bill Camp pro bono (App. 26).

Only Hornbuckle and Montgomery were on pleadings. The evidence and proof is if Hornbuckle and Montgomery were working pro bono, so was Petitioner. There

was no agreement between Petitioner and Hornbuckle and Montgomery for division of fee, only agreement to help Bill. Does Rule *In Re Primus* extend to members of State Bar assisting one another, where no evidence of fee among assisting lawyers only offer of pro bono service from lawyers on pleadings.

CONCLUSION

Throughout this whole controversy, Petitioner's hinged conduct, subjecting to powers of state under both state and Federal Constitution, regulate and discipline attorneys; under these circumstances such conduct may not be arbitrarily or discriminatorily applied. To do so is an obliteration of fundamental right of what is fair and right as well as due process and equal protection under the law, a measure of duty by the state bar which the state has breached. To allow this arbitrary, irrational and discriminatory practice is to set a doctrine, and doctrines tend to grow, destroying the independence of the legal profession and thus toward rendering that profession largely incapable of performing the very kinds of services for the public that most justify existence. For the foregoing reasons a Writ of Certiorari should therefore be granted to review and ultimately reverse the decision below. All of the above and foregoing is thus respectfully submitted.

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APPENDIX TO CERTIORARI

Donald Epperson Kilpatrick
v.
State Bar of Texas

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38. Adversary Council then director of State Bar does not disagree with limited powers... App. 146

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APPENDIX 1
IN THE SUPREME COURT OF TEXAS

No. D-4055

THE STATE BAR OF TEXAS, PETITIONER

v.

DONALD E. KILPATRICK, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

PER CURIAM

In this disciplinary proceeding, the court of appeals reversed and remanded the trial court's order disbarring Donald Kilpatrick for soliciting employment in violation of State Bar disciplinary rules. We reverse the judgment of the court of appeals, and render judgment disbarring Kilpatrick.

Bill Camp, a Houston attorney, suffered brain damage during a routine medical procedure on June 13, 1989. A week later, on June 20, his wife was appointed as his temporary guardian. On September 1, 1989, she became his permanent guardian.

Kilpatrick visited Camp at the Texas Institute for Research and Rehabilitation on July 19, 1989. During this meeting, Kilpatrick obtained Camp's signature on a power of attorney, which purported to authorize

Kilpatrick to represent Camp in a medical malpractice claim. Only Kilpatrick and Camp were present, and neither Camp, his family nor any legal representative requested or authorized Kilpatrick's visit. Kilpatrick later testified he knew Camp only as a "brother lawyer." He said that he had heard of Camp's misfortune through a law firm that, in turn, had learned the news from the emergency room physician on duty at the time of Camp's injury. Kilpatrick learned of Camp's location by calling Camp's office.

When she learned of Kilpatrick's actions, Mrs. Camp told Kilpatrick that the power of attorney was invalid, that she was Camp's guardian, and that Bill Camp was in no condition to retain a lawyer. On July 21, 1989, two days after Kilpatrick obtained Camp's signature, the firm of Hornbuckle & Montgomery filed a medical malpractice claim at Mrs. Camp's request. Mrs. Camp also hired another lawyer, Robert McIntyre, to assist with the guardianship.

At Mrs. Camp's behest, McIntyre went to Kilpatrick's office and demanded that Kilpatrick relinquish any claim to represent Camp under the power of attorney. Kilpatrick refused, and insisted on a referral fee. When McIntyre repeated his demand to Kilpatrick in a letter dated October 6, 1989, Kilpatrick demanded $277,000.00 in exchange for his release.

As guardian, Mrs. Camp filed a Tex. R. Civ. P. 12 Motion for Attorney to Show Authority with the probate court concerning Kilpatrick's power of attorney. On November 17, 1989, the probate court determined that Camp was mentally incompetent on the date he signed

the power of attorney, and that Kilpatrick had no authority to represent him. The probate court also directed Kilpatrick to reimburse Mrs. Camp for the attorneys' fees she had incurred as a result of his actions. On December 8, 1989, the same day the court issued its order, Kilpatrick appeared at McIntyre's office with an unfiled Motion to Recuse the probate judge. Kilpatrick threatened to file the motion unless Mrs. Camp paid him the requested referral fee.

In April 1991, the State Bar filed a disciplinary action against Kilpatrick, charging him with violations of five disciplinary rules. At trial, the jury found that Kilpatrick (1) initiated contact with a prospective client for the purpose of obtaining employment, (2) engaged in conduct involving dishonesty, deceit, or misrepresentation, and (3) with intent to obtain an economic benefit to himself, solicited employment for himself to prosecute or collect a claim. On March 13, the trial court rendered judgment on the verdict, disbarring Kilpatrick.

The court of appeals reversed the trial court's judgment and remanded for new trial on two grounds. ___ S.W.2d ___. First, the court of appeals held that the trial court had erroneously permitted the State Bar to amend its pleadings at trial to include an allegation of barratry. *Id.* at ___. Second, the court held that the trial court abused its discretion in ordering disbarment based on a single act of solicitation. *Id.* at ___. We disagree with the court of appeals on both counts.

The State Bar's expert witness, Fred Hagans, testified on the issue of barratry, first during cross-examination by Kilpatrick's attorney, and then on re-direct examination.

At the subsequent charge conference, the State Bar requested a trial amendment alleging barratry as defined in TEX. PENAL CODE ANN. § 38.12(a) (Vernon Supp. 1993), *reprinted in* TEX. PENAL CODE ANN. § 38.12 note (Vernon Supp. 1994) (Historical and Statutory Notes), *amended by* TEX. PENAL CODE ANN. § 38.12(a) (Vernon Supp. 1994). Over Kilpatrick's objection, the trial court permitted the trial amendment, and included the issue in the charge.

If evidence is objected to at trial on the ground that it is not within the issues made by the pleadings, the court *may* allow the pleadings to be amended and *shall* do so freely when the presentation of the merits will be subserved thereby and the objecting party fails to satisfy the court that the amendment would prejudice that party in maintaining the action or defense on the merits. TEX. R. CIV. P. 66 (emphasis supplied). A court may not refuse a trial amendment unless (1) the opposing party presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face. *Greenhalgh v. Service Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990). The burden of showing surprise or prejudice rests on the party resisting the amendment. *Id.* If the trial amendment is not mandatory, then the decision to permit or deny the amendment rests within the sound discretion of the trial court. TEX. R. CIV. P. 66; *Greenhalgh*, 787 S.W.2d at 939. In such a case, the court's decision to allow or deny a trial amendment may be reversed only if it is a clear abuse of discretion. *Hardin v. Hardin*, 597 S.W.2d 347, 349-50 (Tex. 1980).

The court of appeals held that the trial amendment alleging barratry was "prejudicial on its face" because it added a new cause of action. ___ S.W.2d at ___. In so

doing the court of appeals effectively held that all non-mandatory trial amendments under Rule 66 must be rejected. To the contrary, we hold that the decision to grant or deny the trial amendment was discretionary, and under the circumstances the trial court did not abuse that discretion.

The trial amendment added an additional cause of action to the extent it alleged another ground of attorney misconduct under former Article X, section 7 of the STATE BAR RULES. *See also* TEX. R. DISCIPLINARY P. 1.06(Q) (1992), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A-1 (Vernon Supp. 1994) (current version of same rule). The initial pleadings alleged multiple forms of attorney misconduct in violation of STATE BAR RULES art. X, § 7(1), which is a general prohibition concerning acts or omissions that violate the Texas Code of Professional Responsibility. The trial amendment added an allegation under a different subdivision of the same article and section of the disciplinary rules. STATE BAR RULES art. X, § 7(5) ("engaging in conduct that constitutes barratry as defined by [TEX. PENAL CODE ANN. § 38.12(a) (Vernon Supp. 1993)]"). *See also* TEX. R. DISCIPLINARY P. 1.06(Q)(5) (1992) (current version).

The central allegation in the State Bar's initial complaint was that Kilpatrick violated former TEX. CODE PROFESSIONAL RESPONSIBILITY DR 2-103(D)(1), which prohibited attorneys from initiating contact with prospective clients for the purpose of obtaining employment. *See also,* TEX. DISCIPLINARY R. PROF. CONDUCT 7.02 (1989), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Vernon Supp. 1994) (STATE BAR RULES art. X § 9). Former DR 2-103(D)(1) shares common elements with the criminal offense of

barratry,[1] and the evidence presented at trial supported discipline under either theory. Thus, the trial court, in its discretion, could reasonably have concluded that the trial amendment did not impair Kilpatrick's ability to present his defense. We therefore hold that the trial amendment did not involve the kind of calculated surprise or unfair prejudice that would render it an abuse of discretion.

The court of appeals further based its reversal on the fact that Kilpatrick had not been convicted of barratry in criminal proceedings: "[T]here was no criminal prosecution, yet, the State Bar obtained a finding of criminal wrongdoing without the hardship of the higher burden of proof which is necessary for a conviction." ___ S.W.2d at ___. The court of appeals erred, however, in its assumption that an attorney may not be disciplined for barratry in civil proceedings without first being convicted in criminal proceedings. While barratry is a crime for which an attorney may be prosecuted, a criminal prosecution is not a prerequisite to disciplinary proceedings based on that offense. TEX. GOV'T CODE ANN. § 82.062 (Vernon 1988) ("Any attorney who is guilty of barratry . . . may be [disciplined] . . . regardless of whether the attorney is being prosecuted for, or has been convicted of the offense."). Thus, we hold that the trial amendment resulted in no unfair prejudice, and was clearly within the trial court's discretion.

---

[1] Barratry is the solicitation of employment to prosecute or defend a claim with intent to obtain a personal benefit. TEX. PENAL CODE ANN. § 38.12(a)(3) (Vernon Supp. 1993), *amended by* TEX. PENAL CODE ANN. § 38.12(a) (Vernon Supp. 1994).

The court of appeals also concluded that the trial court's judgment should be reversed because the sanction of disbarment was so disproportionate to Kilpatrick's misconduct that it constituted an abuse of discretion. ___ S.W.2d at ___. We disagree.

The court of appeals characterized Kilpatrick's misconduct as an "isolated act of solicitation." Comparing it to other reported disciplinary cases in which the attorney misconduct "was much more egregious but in which the appellate court approved lesser sanctions," the court concluded that the sanction of disbarment was "so heavy" as be an abuse of discretion. ___ S.W.2d at ___.

The judgment of a trial court in a disciplinary proceeding may be so light, or so heavy, as to constitute an abuse of discretion. *See State v. Ingram*, 511 S.W.2d 252, 253 (Tex. 1974). At the same time, the trial court has broad discretion to determine whether an attorney guilty of professional misconduct should be reprimanded, suspended, or disbarred. *Id.; State v. O'Dowd*, 312 S.W.2d 217, 221 (Tex. 1958). In determining the appropriate sanction for attorney misconduct, a trial court must consider the nature and degree of the professional misconduct, the seriousness of and circumstances surrounding the misconduct, the loss or damage to clients, the damage to the profession, the assurance that those who seek legal services in the future will be insulated from the type of misconduct found, the profit to the attorney, the avoidance of repetition, the deterrent effect on others, the maintenance of respect for the legal profession, the trial of the case, and other relevant evidence concerning the attorney's personal and professional background. TEX. R. DISCIPLINARY P. 3.10 (1992).

The sanction of disbarment does not turn on whether an attorney has engaged in a single act, as opposed to repeated and systematic pattern, of misconduct. Under Disciplinary Rule 3.10, a multitude of factors must be considered. In light of the facts and circumstances presented, we cannot say that the trial court abused its discretion, and we disagree with the court of appeals that the sanction of disbarment is disproportionate to Kilpatrick's misconduct.

We therefore grant the application of the State Bar and, without hearing argument, a majority of the court reverses the judgment of the court of appeals, and renders judgment disbarring Donald Kilpatrick. TEX. R. APP. P. 170.

OPINION DELIVERED: January 5, 1994

APPENDIX 2

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

February 2, 1994

Mr. James M. McCormack
General Counsel
State Bar of Texas
P.O. Box 12487
Austin, TX 78711

Ms. Linda A. Acevedo
Assistant General Counsel
State Bar of Texas
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Holman Hogan
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1212 Lyric Office Centre
Houston, TX 77002

Mr. Wayne Fisher
Fisher Gallagher & Lewis
7000 First Interstate Bank Plaza
1000 Louisiana, 70th Floor
Houston, TX 77002

Re: Case No. D-4055
Style: THE STATE BAR OF TEXAS
v. DONALD E. KILPATRICK
No. 91-14574 in the 55th District Court, Harris County
No. A14-92-00709-CV in the Fourteenth Court of Appeals

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause. Enclosed is a corrected copy of this Court's opinion delivered on January 5, 1994.

Respectfully yours,

JOHN T. ADAMS, CLERK

/S/ Peggy Littlefield,
Peggy Littlefield,
Chief Deputy Clerk

cc: Ms. Katherine Tyra
Hon. Leonard E. Hoffman, Jr.
Hon. Norman Ray Lee

APPENDIX 3

IN THE SUPREME COURT OF TEXAS

No. D-4055

THE STATE BAR OF TEXAS, PETITIONER

v.

DONALD E. KILPATRICK, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

PER CURIAM

In this disciplinary proceeding, the court of appeals reversed and remanded the trial court's order disbarring Donald Kilpatrick for soliciting employment in violation of State Bar disciplinary rules. We reverse the judgment of the court of appeals, and render judgment disbarring Kilpatrick.

Bill Camp, a Houston attorney, suffered brain damage during a routine medical procedure on June 13, 1989. A week later, on June 20, his wife was appointed as his temporary guardian. On September 1, 1989, she became his permanent guardian.

Kilpatrick visited Camp at the Texas Institute for Research and Rehabilitation on July 19, 1989. During this meeting, Kilpatrick obtained Camp's signature on a power of attorney, which purported to authorize Kilpatrick to represent Camp in a medical malpractice

claim. Only Kilpatrick and Camp were present, and neither Camp, his family, nor any legal representative requested or authorized Kilpatick's visit. Kilpatrick later testified he knew Camp only as a "brother in the bar," that they had not been close friends or socialized together, and that their only previous acquaintance had been as opposing counsel on some criminal cases. He said that he had heard of Camp's misfortune through a law firm that, in turn, had learned the news from the emergency room physician on duty at the time of Camp's injury. Kilpatrick learned of Camp's location by calling Camp's office.

On July 21, 1989, two days after Kilpatrick obtained Camp's signature. Hornbuckle & Montgomery, the firm that had contacted Kilpatrick, filed a malpractice lawsuit against the doctors who treated Camp. When Ms. Camp learned of Kilpatrick's actions, she told Kilpatrick that the power of attorney was invalid, that she was Camp's guardian, and that Bill Camp was in no condition to retain a lawyer. Ms. Camp also hired a probate lawyer, Robert McIntyre, to assist her with the guardianship.

At Ms. Camp's behest, McIntyre went to Kilpatrick's office and demanded that Kilpatrick relinquish any claim to represent Camp under the power of attorney. Kilpatrick refused, and insisted on a referral fee. When McIntyre repeated his demand to Kilpatrick in a letter dated October 6, 1989, Kilpatrick demanded $277,000.00 in exchange for his release.

As guardian, Ms. Camp filed a Tex R. Civ. P. 12 Motion for Attorney to Show Authority with the probate court concerning Kilpatrick's power of attorney. On

November 17, 1989, the probate court determined that Camp was mentally incompetent on the date he signed the power of attorney, and that Kilpatrick had no authority to represent him.[1] The probate court also directed Kilpatrick to reimburse Ms. Camp for the attorneys' fees she had incurred as a result of his actions. On December 8, 1989, the same day the court issued its order, Kilpatrick appeared at McIntyre's office with an unfiled Motion to Recuse the probate judge. Kilpatrick threatened to file the motion unless Ms. Camp paid him the requested referral fee.

In April 1991, the State Bar filed a disciplinary action against Kilpatrick, charging him with violations of five disciplinary rules. At trial, the jury found that Kilpatrick (1) initiated contact with a prospective client for the purpose of obtaining employment, (2) engaged in conduct involving dishonesty, deceit, or misrepresentation, and (3) with intent to obtain an economic benefit to himself, solicited employment for himself to prosecute or collect a claim. On March 13, the trial court rendered judgment on the verdict, disbarring Kilpatrick.

The court of appeals reversed the trial court's judgment and remanded for new trial on two grounds. ___ S.W.2d ___. First, the court of appeals held that the trial court had erroneously permitted the State Bar to amend its pleadings at trial to include an allegation of barratry. *Id.* at ___. Second, the court held that the trial court

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[1] Some time after the court held Kilpatrick was disqualified, Ms. Camp retained Richard Mithoff to handle the malpractice claim. Mithoff eventually reached a settlement with Camp's doctors.

abused its discretion in ordering disbarment based on a single act of solicitation. *Id.* at ___. We disagree with the court of appeals on both counts.

The State Bar's expert witness, Fred Hagans, testified on the issue of barratry, first during cross-examination by Kilpatrick's attorney, and then on redirect examination. At the subsequent charge conference, the State Bar requested a trial amendment alleging barratry as defined in TEX. PENAL CODE ANN. § 38.12(a) (Vernon Supp. 1993), *reprinted in* TEX. PENAL CODE ANN. § 38.12 note (Vernon Supp. 1994) (Historical and Statutory Notes), *amended by* TEX. PENAL CODE ANN. § 38.12(a) (Vernon Supp. 1994). Over Kilpatrick's objection, the trial court permitted the trial amendment, and included the issue in the charge.

If evidence is objected to at trial on the ground that it is not within the issues made by the pleadings, the court *may* allow the pleadings to be amended and *shall* do so freely when the presentation of the merits will be subserved thereby and the objecting party failed to satisfy the court that the amendment would prejudice that party in maintaining the action or defense on the merits. TEX. R. CIV. P. 66 (emphasis supplied). A court may not refuse a trial amendment unless (1) the opposing party presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face. *Greenhalgh v. Service Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990). The burden of showing surprise or prejudice rests on the party resisting the amendment. *Id.* If the trial amendment is not mandatory, then the decision to permit or deny the amendment rests within the sound discretion of the trial court. TEX. R. CIV. P. 66: *Greenhalgh*, 787 S.W.2d 939. In such a case, the

court's decision to allow or deny a trial amendment may be reversed only if it is a clear abuse of discretion. *Hardin v. Hardin*, 597 S.W.2d 347, 349-50 (Tex. 1980).

The court of appeals held that the trial amendment alleging barratry was "prejudicial on its face" because it added a new cause of action. ___ S.W.2d at ___. In so doing the court of appeals effectively held that all non-mandatory trial amendments under Rule 66 must be rejected. To the contrary, we hold that the decision to grant or deny the trial amendment was discretionary, and under the circumstances the trial court did not abuse that discretion.

The trial amendment added an additional cause of action to the extent it alleged another ground of attorney misconduct under former Article X, section 7 of the STATE BAR RULES. *See also* TEX. R. DISCIPLINARY P. 1.06(Q) (1992), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A-1 (Vernon Supp. 1994) (current version of same rule). The initial pleadings alleged multiple forms of attorney misconduct in violation of STATE BAR RULES art. X, § 7(1), which is a general prohibition concerning acts or omissions that violate the Texas Code of Professional Responsibility. The trial amendment added an allegation under a different subdivision of the same article and section of the disciplinary rules. STATE BAR RULES art. X, § 7(5) ("engaging in conduct that constitutes barratry as defined by [TEX. PENAL CODE ANN. § 38.12(a) (Vernon Supp. 1993)]"). *See also* TEX. R. DISCIPLINARY P. 1.06(Q)(5) (1992) (current version).

The central allegation in the State Bar's initial complaint was that Kilpatrick violated former TEX. CODE PROFESSIONAL RESPONSIBILITY DR 2-1-103(D)(1), which prohibited attorneys from initiating contact with prospective clients for the purpose of obtaining employment if the lawyer knew or reasonably should have known the person could not have exercised reasonable judgment in employing a lawyer. *See also*, TEX. DISCIPLINARY R. PROF. CONDUCT 7.02 (1989), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Vernon Supp. 1994) (STATE BAR RULES art. X § 9). Former DR 2-103(D)(1) shares common elements with the criminal offense of barratry,[2] and the evidence presented at trial supported discipline under either theory. Thus, the trial court, in its discretion, could reasonably have concluded that the trial amendment did not impair Kilpatrick's ability to present his defense. We therefore hold that the trial amendment did not involve the kind of calculated surprise or unfair prejudice that would render it an abuse of discretion.

The court of appeals further based its reversal on the fact that Kilpatrick had not been convicted of barratry in criminal proceedings: "[T]here was no criminal prosecution, yet, the State Bar obtained a finding of criminal wrongdoing without the hardship of the higher burden of proof which is necessary for a conviction." ___ S.W.2d at ___. The court of appeals erred, however, in its assumption that an attorney may not be disciplined for barratry

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[2] Barratry is the solicitation of employment to prosecute or defend a claim with intent to obtain a personal benefit. TEX. PENAL CODE ANN, § 38.12(a)(3) (Vernon Supp. 1993), *amended by* TEX. PENAL CODE ANN. § 38.12(a) (Vernon Supp. 1994).

in civil proceedings without first being convicted in criminal proceedings. While barratry is a crime for which an attorney may be prosecuted, a criminal prosecution is not a prerequisite to disciplinary proceedings based on that offense. TEX. GOV'T CODE ANN. § 82.062 (Vernon 1988) ("Any attorney who is guilty of barratry . . . may be [disciplined] . . . regardless of whether the attorney is being prosecuted for, or has been convicted of the offense."). Thus, we hold that the trial amendment resulted in no unfair prejudice, and was clearly within the trial court's discretion.

The court of appeals also concluded that the trial court's judgment should be reversed because the sanction of disbarment was so disproportionate to Kilpatrick's misconduct that it constituted an abuse of discretion. ___ S.W.2d at ___. We disagree.

The court of appeals characterized Kilpatrick's misconduct as an "isolated act of solicitation." Comparing it to other reported disciplinary cases in which the attorney misconduct "was much more egregious but in which the appellate court approved lesser sanctions," the court concluded that the santion of disbarment was "so heavy" as be an abuse of discretion. ___ S.W.2d at ___.

The judgment of a trial court in a disciplinary proceeding may be so light, or so heavy, as to constitute an abuse of discretion. *See State v. Ingram*, 511 S.W.2d 252, 253 (Tex. 1974). At the same time, the trial court has broad discretion to determine whether an attorney guilty of professional misconduct should be reprimanded, suspended, or disbarred. *Id.; State v. O'Dowd*, 312 S.W.2d 217, 221 (Tex. 1958). In determining the appropriate sanction

for attorney misconduct, a trial court must consider the nature and degree of the professional misconduct, the seriousness of and circumstances surrounding the misconduct, the loss or damage to clients, the damage to the profession, the assurance that those who seek legal services in the future will be insulated from the type of misconduct found, the profit to the attorney, the avoidance of repetition, the deterrent effect on others, the maintenance of respect for the legal profession, the trial of the case, and other relevant evidence concerning the attorney's personal and professional background. TEX. R. DISCIPLINARY P. 3.10 (1992). The court may, in its discretion, hold a separate evidentiary hearing and take evidence on these issues. *Id.*

The sanction of disbarment does not turn on whether an attorney has engaged in a single act, as opposed to repeated and systematic pattern, of misconduct. Under Disciplinary Rule 3.10, a multitude of factors must be considered. In light of the facts and circumstances presented, we cannot say that the trial court abused its discretion, and we disagree with the court of appeals that the sanction of disbarment is disproportionate to Kilpatrick's misconduct.

We therefore grant the application of the State Bar and, without hearing argument, a majority of the court reverses the judgment of the court of appeals, and renders judgment disbarring Donald Kilpatrick. TEX. R. APP. P.170.

OPINION DELIVERED: January 5, 1994

APPENDIX 4

Reversed and Remanded and Opinion filed May 20, 1993.

[SEAL]

In The
Fourteenth Court of Appeals

NO. A14-92-00709-CV

DONALD E. KILPATRICK, Appellant

V.

THE STATE BAR OF TEXAS, Appellee

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 91-14574

OPINION

This is a disciplinary proceeding. Appellee, The State Bar of Texas (State Bar), filed suit against appellant, Donald E. Kilpatrick an attorney, for alleged professional misconduct in soliciting his legal services to Bill Camp. The case was tried to a jury which found in favor of the State Bar and the Court entered judgment disbarring Kilpatrick from the practice of law. Kilpatrick appeals, bringing fifteen points of error. We reverse and remand for a new trial.

On June 13, 1989, Bill Camp, an attorney in Houston, suffered a brain injury during a routine, out-patient medical procedure. On June 20, 1989, Bill Camp's wife, Susie, was appointed to serve as temporary guardian for her

husband and Nancy Lipp was appointed attorney ad litem for Mr. Camp. On June 30, 1989, the probate court issued an Order Affirming Temporary Guardianship and for Payment of Attorney Ad Litem. Susie Camp was appointed permanent guardian on September 1, 1989. Prior to his injury, Bill Camp had been separated from his wife. On July 19, 1989, Kilpatrick visited Mr. Camp, who was still hospitalized at the Texas Institute for Research and Rehabilitation (TIRR). That visit was not requested by Bill Camp, his family or any legal representative of Mr. Camp. During that visit, Kilpatrick obtained the signature of Bill Camp on a power of attorney that authorized Kilpatrick to prosecute a medical malpractice action. It also authorized Kilpatrick to associate with other legal counsel to protect Mr. Camp's interests. Only Kilpatrick was present when Mr. Camp signed the power of attorney. A few days before his visit, Kilpatrick had learned of possible negligence in connection with Mr. Camp's injury from the law firm of Hornbuckle and Montgomery. The law firm had learned of Mr. Camp's injury from Dr. C. Jay Morris, who was the emergency room physician on duty at the time of the incident. Kilpatrick had telephoned Mr. Camp's law office to find out where Mr. Camp was hospitalized. According to Kilpatrick, Mr. Camp's associate did not mention Mr. Camp's incapacity but told him that Mr. Camp would be glad to have visitors. Kilpatrick only knew Bill Camp as a "brother lawyer." Before this incident, Kilpatrick never socialized with Bill Camp outside the practice of law or met Bill Camp's family.

As he was leaving Mr. Camp's hospital room, Kilpatrick met Bill Camp's mother, Barbara, and Joseph Dale Dodd, a family friend. According to Kilpatrick, he

told Barbara Camp that he was "Bill's lawyer." Kilpatrick says that Barbara Camp did not protest this statement. When Kilpatrick told Dodd that Mr. Camp had "signed something," Dodd responded that he was helping the Camp family look for legal representation for Bill and he named several attorneys. The following day, Kilpatrick telephoned Susie Camp at her home where she was recuperating from an auto accident. According to Kilpatrick, the telephone call was at Bill Camp's request. He told her that Bill had authorized him to proceed with a lawsuit. Susie Camp responded that she had been appointed temporary guardian of Bill's estate, "that Bill was in no condition to hire anyone," and that Kilpatrick "did not have any authorization to do anything." On July 21, 1989, two days after Kilpatrick's visit, the law firm of Hornbuckle and Montgomery filed a medical malpractice lawsuit on behalf of Bill Camp.

Following her conversation with Kilpatrick, Susie Camp hired a lawyer, Robert MacIntyre, to assist her with the guardianship. Mr. MacIntyre went to Kilpatrick's office and asked him to relinquish his contract with Mr. Camp. Kilpatrick refused, stating that he had valid contract and was entitled to a referral fee. By letter to Kilpatrick dated October 6, 1989, Mr. MacIntyre again requested Kilpatrick to relinquish his contract with Bill Camp because Mr. Camp was "incompetent" and "incapable of entering into a contract." In a response letter dated October 10, 1989, Kilpatrick again refused and asserted his belief in Bill's competence and the validity of the contract. Kilpatrick ended the letter by offering to surrender his rights under the contract for $277,000.00.

That figure, according to Kilpatrick, was not based on any formula or calculation.

On November 17, 1989, the probate court held a hearing on a Motion to Show Authority filed pursuant to TEX. R. CIV. P. 12 by Susie Camp as guardian of the person and estate of Bill Camp. The court found that Bill Camp was adjudicated incompetent on June 20, 1989, that he was incompetent on the date he signed the power of attorney with Kilpatrick, and that the medical malpractice action prosecuted on Bill Camp's behalf was without the authority of his legal guardian. The order signed by the court on December 8, 1989, declared the power of attorney void and required Kilpatrick to pay attorney's fees to Susie Camp, as guardian. That same day, Kilpatrick appeared at Mr. MacIntyre's office with a motion to recuse the probate judge and an offer to refrain from filing the motion if Mr. MacIntyre would pay him a referral fee.

The State Bar filed its disciplinary petition four months later in April 1991. The petition alleges that Kilpatrick: violated a disciplinary rule (DR 1-102(A)(1)); engaged in conduct involving dishonesty, deceit, or misrepresentation (DR 1-102(A)(4)); engaged in conduct that is prejudicial to the administration of justice (DR 1-102(A)(5)); engaged in other conduct that adversely reflected on his fitness to practice law DR 1-102(a)(6); and initiated contact with a prospective client for the purpose of obtaining employment (DR 2-103(D)(1)). *See* TEXAS CODE OF PROFESSIONAL RESPONSIBILITY, *repealed by* SUPREME COURT, STATE BAR RULES (TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT), V.T.C.A., TEX. GOV'T CODE ANN., Title

2, Subtitle G, Appendix, art. X, § 9 (effective January 1, 1990).

Trial was on March 10, 1992. Three questions were submitted to the jury. Jury question 1 asked: "Did Donald E. Kilpatrick initiate contact with Bill Camp as a prospective client for the purpose of obtaining professional employment when he knew or should have known that Bill Camp could not exercise reasonable judgment in employing a lawyer." Questions 2(a) through 2(d) asked whether "Donald E. Kilpatrick engage[d] in conduct involving dishonesty, fraud, deceit or misrepresentation:" (a) "in obtaining Bill Camp's signature on a power of attorney employing Donald E. Kilpatrick as an attorney to prosecute a medical malpractice claim;" (b) "in asserting that Bill Camp was competent to enter into a contract;" (c) "in associating with other attorneys to file suit on behalf of Bill Camp after being advised that Bill Camp was the subject of a temporary guardianship;" and (d) "in requesting payment of $277,000.00 to relinquish his claims under the contract signed by Bill Camp." Jury question 3 asked: "Did Donald E. Kilpatrick, with intent to obtain an economic benefit for himself, solicit employment for himself to prosecute a suit or to collect a claim." All three questions were answered in the affirmative. The following morning, the court heard argument on sanctions and on March 13, 1992, entered judgment disbarring Kilpatrick from the practice of law. We address only points six and eight through thirteen because they are dispositive of this appeal.

In points of error eight through thirteen, Kilpatrick contends the trial court erred in allowing the State Bar's

trial amendment on the conduct of barratry and in submitting that issue to the jury. At trial, there was a single passing reference to "barratry" during the testimony of expert, Fred Hagans. On re-direct examination, Mr. Hagans was asked to define barratry. Kilpatrick's counsel objected that the definition was a "matter for the court." The court overruled that objection and Hagans answered: "Well generally it's a statute that makes it a criminal offense to solicit business by, you know, under certain circumstances." Mr. Hagans was then asked whether the barratry statute makes a distinction between the location of the solicitation. Kilpatrick's counsel objected that the subject had not been addressed on cross-examination and was not proper for redirect. The court overruled that objection and Hagans responded that he could not recall the statute making such a distinction.

During the charge conference, the State Bar requested a trial amendment on "barratry" that contained the definition in TEX. PENAL CODE ANN. § 38.12(a) (Vernon Supp 1993). Kilpatrick's counsel objected that the issue was "not in their petition," that there was no "real testimony to that effect," and that it had not been tried by implied consent. Counsel for the State Bar responded that testimony of barratry was before the jury without objection. The court granted the State Bar's trial amendment and a copy of the proposed charge was submitted to the court. Question 3 conformed to the language in the trial amendment. It also instructed the jury "that intent to obtain an economic benefit is presumed if a person accepts employment for a fee, accepts a fee, or accepts or agrees to accept money or any economic benefit." TEX. PENAL CODE ANN. § 38.12(b) (Vernon Supp. 1993). At that point, Kilpatrick's

counsel objected that the question and instruction were not relevant to the case, not supported by the pleadings, and did not constitute a violation of the disciplinary rules. Kilpatrick's counsel further stated that he was "not qualified or ready to try a barratry case," that he was "surprised," and that it was an "unfair jury question." The court overruled these objections. Kilpatrick's attorney then moved for a continuance which was promptly denied by the trial court.

A trial court has no discretion to refuse a trial amendment unless: (1) the opposing party presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face and the opposing party objects to the amendment. *Greenhalgh v. Service Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990) (citations omitted); *see* TEX. R. CIV. P. 63 and 66. Here, the trial amendment was prejudicial on its face. While counsel's objections to the trial amendment and jury question were inartfully stated, it is obvious from his objections that he thought section 38.12 could not be applied to a disciplinary proceeding.

Former article X, section 7(5) of the State Bar Rules, now section 8.04(8) of the disciplinary rules, states that discipline may be imposed for professional misconduct which includes engaging in conduct which constitutes barratry as defined by the law of this State. STATE BAR RULES, article X, § 7(5), *repealed by* SUPREME COURT, RULES OF DISCIPLINARY PROCEDURE, V.T.C.A., TEX. GOV'T CODE ANN. Title 2, Subtitle G, Appendix A-1, § 1.04 (Vernon Supp. 1993) (effective May 1, 1992). The law of this State defines "barratry" in section 38.12, a criminal statute. While an attorney may be disciplined for an act which constitutes

an offense under the Penal Code, the disciplinary rules and not the Penal Code provide the basis for discipline. *See Smith v. State*, 523 S.W.2d 1, 5-6 (Tex. App. – Corpus Christi 1975, writ ref'd n.r.e.); *see also* TEX. GOV'T CODE ANN. § 82.062 (Vernon 1988). A disciplinary proceeding is a civil, not a criminal trial. *State Bar of Texas v. Evans*, 774 S.W.2d 656, 657 n. 1 (Tex. 1989). While the disciplinary rules authorize discipline for certain acts that may also violate the criminal law, they were not intended to supplant the Penal Code or permit criminal prosecutions within civil disciplinary proceedings. Section 38.12(e) provides that a "final conviction of felony barratry is a serious crime for all purposes and acts, specifically including the State Bar Rules." That section, when read with section 8.04 of the disciplinary rules and the rules of disciplinary procedure, contemplates a criminal prosecution for barratry *in addition to* discipline for professional misconduct. SEE RULES OF DISCIPLINARY PROCEDURE, 1.06, 8.01-8.06.

Here, Kilpatrick could have been prosecuted for barratry and then the State Bar could have used that conviction in this disciplinary proceeding. STATE BAR RULES, article X, § 26 (repealed 1992). Instead, there was no criminal prosecution, yet, the State Bar obtained a finding of criminal wrongdoing without the hardship of the higher burden of proof which is necessary for a conviction. That procedure was improper and prejudicial. We are aware of the language in section 82.062 of the Government Code authorizing the disbarment of an attorney "who is guilty of barratry . . . regardless of the fact that the act complained of may be an offense under the Penal Code and regardless of whether the attorney is being

prosecuted for, or has been convicted of the offense." We read section 82.062 as merely authorizing discipline for professional misconduct which not only is a violation of the disciplinary rules, but of the Penal Code. This section does not, however, dispense with the requirement of obtaining a criminal conviction for use in a subsequent disciplinary proceeding. "Solicitation" is not only a violation of the disciplinary rules but of TEX. PENAL CODE ANN. § 38.12. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, § 7.04. In the instant case, the State Bar correctly proceeded under the disciplinary rule that prohibited solicitation. DR- 2-103(d)(1) (repealed 1990). It was unnecessary and improper for the State Bar to obtain a finding of criminal wrongdoing where it had already proven a violation of the disciplinary rules. Submission of such a duplicitous issue was clearly erroneous and we can only conclude that it was done to prejudice Kilpatrick. *See Holmes v. J.C. Penny [sic] Co.*, 382 S.W.2d 472 (Tex. 1964); *see also* TEX. GOV'T CODE ANN. § 82.062.

Also, by allowing the trial amendment and submission of question 3, the State Bar was permitted to submit an improper instruction. As we noted, the instruction tracked the language in section 38.12(b), however, subsection b was not even in effect at the time of the solicitation. *See* Act of Sept. 1 1989, 71st Leg., R.S., ch. 866, §§ 2, 5(a) 1989 Tex. Gen Laws 3855, 3856-57. Finally, we observe that "barratry is defined to prohibit conduct that tends to foment litigation, for purposes other than the pursuit of justice, in situations where litigation might not otherwise arise." TEX. PENAL CODE ANN. § 38.12 (Vernon 1974) (practice commentary). In the instant case, Kilpatrick's conduct did not "tend to foment litigation" because it is

undisputed that Bill Camp required a lawyer and that litigation of Mr. Camp's medical malpractice claim was likely regardless of who represented him. Accordingly, we find that the trial court erred in granting the trial amendment and in submitting jury question 3. Viewing the totality of the circumstances, we find that the inclusion of the question 3 and the accompanying instruction amounted to such a denial of Kilpatrick's rights as to cause the rendition of an improper judgment. *Island Recreational Dev. Corp. v. Republic of Texas Sav. Assoc.*, 710 S.W.2d 551, 555 (Tex. 1986); TEX. R. APP. P. 81(b). We sustain points eight through thirteen.

In his sixth point of error, Kilpatrick contends the trial court abused its discretion in ordering him disbarred. A contention that there has been an abuse of discretion presents a question of law. *Smith v. State*, 490 S.W.2d 902, 912 (Tex. App. – Corpus Christi 1972, writ ref'd n.r.e.) (*quoting State v. O'Dowd*, 158 Tex. 348, 312 S.W.2d 217, 221 (1958)). The trial court has broad discretion to determine whether an attorney should be reprimanded, suspended or disbarred as a result of a finding of professional misconduct in a disciplinary proceeding. *See O'Dowd*, 312 S.W.2d at 221; *State Bar of Texas v. Wolfe*, 801 S.W.2d 202, 204 (Tex. App. – Amarillo 1985, writ ref'd n.r.e.); STATE BAR RULES, art. X §§ 8, 23 (repealed 1992). The very authorization of a wide range of sanctions for violations of the disciplinary rules contemplates just discipline for the misconduct committed. *Daves v. State Bar of Texas*, 691 S.W.2d 784, 791 (Tex. App. – Amarillo 1985, writ ref'd n.r.e.), *dism'd*, 474 U.S. 1043 (1986). A judgment of a trial court in a disciplinary proceeding may be so light, or so

heavy, as to constitute an abuse of discretion. *Id.* (*citing State v. Ingram*, 511 S.W.2d 252, 253 (Tex. 1974)).

The State Bar cites former article X, section 23 of the State Bar Rules which was in effect at the time of this proceeding. That section listed several factors that the trial court was required to consider if it decided in its discretion to hold an evidentiary hearing on the appropriate measure of discipline. The trial court, however, did not hear additional evidence on sanctions but allowed both sides to argue the evidence presented at trial. Counsel for the State Bar argued for disbarment pointing out that this case involved in-person solicitation of a mentally and physically impaired accident-victim. Counsel maintained that the jury's verdict supported a finding that Kilpatrick violated the disciplinary rules described in the State Bar's petition. Counsel also invoked TEX. GOV'T CODE ANN. § 82.062. Kilpatrick's counsel argued that mitigating circumstances existed. The trial court's judgment recites that it is based on the jury's findings and the applicable law.

Kilpatrick cites a host of cases in which the conduct found against the attorney was much more egregious but in which an appellate court approved lesser sanctions. *See e.g. Musselwhite v. State Bar of Texas*, 786 S.W.2d 437, 439 (Tex. App. – Houston [14th Dist.] 1990, writ denied) (attorney, on probation for prior misconduct, *suspended for three years* for knowingly violating terms of probation by soliciting accident victims and accepting new employment when prohibited from doing so); *Hebison*, 615 S.W.2d at 867 (attorney *suspended for three months* for falsely telling two separate clients that suit filed, thus, resulting in limitations bar and for refusing to return

either clients' money or file until grievance filed); *Howell v. State*, 559 S.W.2d 432, 433-34 (Tex. App. – Tyler 1977, writ ref'd n.r.e.) (attorney *reprimanded* for filing divorce suit when he knew another divorce suit involving same parties was pending in another court, for not telling judge of other case and for refusing to answer a question at contempt hearing when ordered by the judge); *Archer*, 548 S.W.2d at 72-73 (attorney *suspended for two years* for depositing client funds in his own account for own use and for attempting to get client to sign false affidavit); *Galindo v. State*, 535 S.W.2d 923, 925 (Tex. App. – Corpus Christi 1976, no writ) (attorney *suspended for one year* for misapplying and commingling client's funds and for lying to grievance committee); *Baker*, 539 S.W.2d at 369 (attorney received *three reprimands* for purchasing property at sheriff's sale and using property to secure further compensation for himself without notice to, or consent of, client) *Ingram*, 511 S.W.2d at 252-53 (attorney *suspended for three years* for misappropriating client's funds and for lying under oath to grievance committee); *State v. Pevehouse*, 483 S.W.2d 565, 565-66 (Tex. App. – Eastland 1972, writ ref'd n.r.e.) (attorney *suspended for one year* for embezzling $2,500.00 of client's funds).

In the instant case, Kilpatrick was not convicted of a crime. He did not misappropriate, commingle, or embezzle client funds; fail or refuse to return client property; forge a document; or lie to a court, grievance committee or client. Furthermore, there is no evidence that Kilpatrick has ever had a grievance filed against him, much less been disciplined, in his eighteen years of practice. More importantly, we cannot say what influence the

improper barratry finding had on the trial court's assessment of punishment where as here, the punishment was not segregated for each count of misconduct. *See Smith v. State*, 490 S.W.2d 902, 912 (Tex. App. – Corpus Christi 1972, writ ref'd n.r.e.). While we strongly disapprove of Kilpatrick's conduct, there is no support in the jurisprudence of this State for a sanction of disbarment based on an isolated act of solicitation and nothing more. Accordingly, we find that the trial court's judgment of disbarment is so heavy as to constitute an abuse of discretion. *Ingram*, 511 S.W.2d at 253. We sustain point of error six. Accordingly, we reverse the judgment of the trial court and remand to that court for a new trial.

/s/ Norman R. Lee
Justice

Judgment rendered and Opinion filed May 20, 1993.

Panel consists of Chief Justice J. Curtiss Brown, and Justices Ellis and Lee.

Do Not Publish – TEX. R. APP. P. 90.

APPENDIX 5

May 20, 1993

[SEAL]

JUDGMENT

The Fourteenth Court of Appeals

DONALD E. KILPATRICK APPELLANT

NO. A14-92-00709-CV V.

THE STATE BAR OF TEXAS, APPELLEE

This cause, an appeal from the judgment in favor of appellee, The State Bar of Texas, signed March 13, 1992, came on to be heard on the transcript of the record. We have inspected the record and find error in the judgment. We therefore order the judgment of the court below **REVERSED** and **REMAND** the cause for proceedings in accordance with the court's opinion.

We order appellee, The State Bar of Texas, to pay all costs incurred because of this appeal.

We order this decision certified below for observance.

APPENDIX 6

NO. 91-14574

THE STATE BAR OF TEXAS	§	IN THE DISTRICT COURT OF HARRIS
V.	§	COUNTY, TEXAS 55TH
	§	JUDICIAL DISTRICT
DONALD E. KILPATRICK	§	

JUDGMENT

On the 9th day of March, 1992, the above styled and numbered cause came on for trial to a jury.

Petitioner, the Grievance Committee for State Bar District No. 4G, State Bar of Texas, appeared through its attorney of record and announced ready for trial.

Respondent, **DONALD E. KILPATRICK,** appeared in person and through his attorney and announced ready for trial.

Thereafter a jury of twelve citizens of Harris County, Texas was empaneled and duly sworn to try the case.

The jury having considered the pleadings and having heard the evidence and argument of counsel, and having retired on the 10th day of March, 1992, to consider its verdict, on that same date returned into open court their verdict consisting of the following answers to the jury questions hereinafter set out.

JURY QUESTION NO. 1

Did Donald E. Kilpatrick initiate contact with Bill Camp as a prospective client for the purpose of obtaining professional employment when he knew or reasonably should have known that Bill

Camp could not exercise reasonable judgment in employing a lawyer?

Answer "Yes" or "No"

ANSWER: Yes

JURY QUESTION NO. 2

In connection with each of the following listed acts, events, transactions or occurrences did Donald E. Kilpatrick engage in conduct involving dishonesty, fraud, deceit, or misrepresentation?

For each act, event, transaction or occurrence answer "Yes" or "No" in the space indicated.

a) in obtaining the Signature of Bill Camp on a power of attorney employing Donald E. Kilpatrick as an attorney to prosecute a medical malpractice claim.

ANSWER: Yes

b) in asserting that Bill Camp was competent to enter into a contract.

ANSWER: Yes

c) in associating other attorneys to file a lawsuit on behalf of Bill Camp after being advised that Bill Camp was the subject of a temporary guardianship.

ANSWER: Yes

d) in requesting payment of $277,000 to relinquish his claims under the contract signed by Bill Camp.

ANSWER: Yes

JURY QUESTION NO. 3

In connection with this question you are instructed that intent to obtain an economic benefit is presumed if a person accepts employment for a fee, accepts a fee, or accepts or agrees to accept money or any economic benefit.

Did Donald E. Kilpatrick, with intent to obtain an economic benefit for himself, solicit employment for himself to prosecute a suit or to collect a claim?

Answer "Yes" or "No"

ANSWER: Yes

The verdict of the jury was received in open court and accepted by the Court who ordered the jury's verdict to be filed. The jury was then discharged.

The Court, based upon the findings by the jury and the law applicable thereto concludes that Respondent has committed professional misconduct as defined by Article X, Section 7(1) and Section 7(5), State Bar Rules and in violation of DR1-102(A)(1), 1-102(A)(4), 1-102(A)(5), 1-102(A)(6) and 2-103(D)(1), Texas Code of Professional Responsibility.

Therefore, the Court concludes and is of the opinion and so finds that the proper discipline of the Respondent for such occurrences of professional misconduct is disbarment.

It is accordingly, **ORDERED, ADJUDGED,** and **DECREED** THAT THE Respondent, **DONALD E. KILPATRICK,** be and he is hereby, disbarred as an attorney at law in the State of Texas, and his license to practice law in this state is hereby revoked. Respondent shall

hereafter exercise none of the privileges and prerogatives of the offices of attorney at law in this state.

It is further **ORDERED, ADJUDGED,** and **DECREED** that the Respondent, **DONALD E. KILPATRICK,** is hereby permanently enjoined from practicing law in Texas, holding himself out as an attorney, performing any legal services for others, accepting any fee directly or indirectly for legal services rendered after this date, appearing as counsel or in any representative capacity in any proceeding in any Texas court or before any Texas administrative body, or holding himself out to others or using his name in any matter in conjunction with the words "attorney," "counselor at law," or "lawyer."

It is **FURTHER ORDERED,** that on or before the expiration of thirty days from the date of this Judgment the Respondent shall notify each of his current clients in writing of this disbarment. In addition to such notification, Respondent is **ORDERED** to return all files, papers, monies, including unearned fees, and other property belonging to clients and former clients in the Respondent's possession to the respective clients or former clients or another attorney at the client's or former client's request. Said Respondent is **ORDERED** to file with this Court on or before the expiration of thirty days from the date of this Judgment, an affidavit stating that all current clients have been notified of the Respondent's disbarment and that all files, papers, monies, including unearned fees, and other property belonging to clients and former clients have been returned as ordered herein together with a true and correct copy of any communication directed to such clients and former clients and a list

setting forth the names and addresses of the intended recipients of such communications. In the event Respondent is unable to comply in any respect with this requirement, he shall state with particularity, under oath, what client or clients he was unable to contact and what efforts he made to comply with this order.

It is **FURTHER ORDERED,** that on or before the expiration of thirty days from the date of this Judgment, Respondent shall notify in writing each and every court in which the Respondent has any matter pending, of the terms of this Judgment, the style and cause number of the pending matters in which the Respondent appears as an attorney, together with the name, address and telephone number of the client the Respondent is representing in that court.

It is **FURTHER ORDER** that Respondent, **DONALD E. KILPATRICK,** immediately surrender his Texas law license and permanent State Bar card to the Office of the General Counsel of the State Bar of Texas at P.O. Box 12487, Austin, Texas 78711 for transmittal to the Clerk of the Supreme Court of Texas.

It is **FURTHER ORDERED,** that as an additional sanction for professional misconduct pursuant to Article X, Section 8(7), State Bar Rules, Petitioner shall have judgment against Respondent in the amount of $12,000.00 as reasonable and necessary attorney's fees incurred in the prosecution of this action together with interest on said sum at the rate of six percent (6%) per annum until paid.

It is **FURTHER ORDERED,** that the Clerk of this Court shall forward a certified copy of the Original Disciplinary Petition on file herein, along with a copy of this Judgment to each, the Clerk of the Supreme Court of Texas, Supreme Court Building, Austin, Texas 78711, and to the General Counsel of the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711.

It is **FURTHER ORDERED,** that as an additional sanction for professional misconduct pursuant Article X, Section 8(7), State Bar Rules, all costs of Court herein incurred, including all filing fees or other taxable costs, all funds expended by the State of Texas and by Harris County, Texas, as compensation and expenses in connection with the assignment of the visiting judge presiding herein, as well as the costs of juror per diem payments shall be taxed against the Respondent, **DONALD E. KILPATRICK.** The Court finds that the costs of Court payable by Respondent are as follows: To the State of Texas in connection with the assignment of the Judge presiding herein the amount of $838.38; to Harris County, Texas, in connection with the assignment of the Judge presiding herein in the amount of $282.50; to Harris County, Texas for juror per diem expenses $252.00; all such sums are to be paid together with interest at the rate of six percent (6%) per annum until paid. For all costs herein ordered to be paid by Respondent which the Clerk may have her execution if they are not timely paid.

All relief not granted herein is **DENIED.**

Signed this 13th day of March , 1992.

_____

JUDGE PRESIDING

APPROVED AS TO FORM AND SUBSTANCE:

_____

D. Craig Landin
Assistant General Counsel
STATE BAR OF TEXAS
1001 Fannin, Suite 1510
Houston, Texas 77002
(713) 759-6931
Telecopier No. (713) 759-1932
State Bar Card No. 11863700

ATTORNEY FOR PETITIONER

APPROVED AS TO FORM ONLY:

_____

Andrew C. Brown
3100 Richmond, Suite 500
Houston, Texas 77098
(713) 520-5167
Telecopier No. 527-9376
State Bar Card No. 03091000

ATTORNEY FOR RESPONDENT

APPENDIX 7

ART. 10, § 9. PROFESSIONAL RESPONSIBILITY

DR 2-103. RECOMMENDATION OF PROFESSIONAL EMPLOYMENT

(A) A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer, except as follows:

(1) A lawyer may advertise in the public media within the limits of DR 2-101, so long as the advertising communication does not take place in person or by telephone.

(2) A lawyer may recommend employment of himself or other attorneys in person to groups of individuals, so long as there is no potential for intimidation or overreaching by such personal contact.

(3) A lawyer may recommend himself or other attorneys to a prospective client, if such individual is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client.

(4) A lawyer may recommend himself or other attorneys to a prospective client if such lawyer is acting on behalf of a bona fide, nonprofit organization that pursues litigation as a vehicle for effective political expression, and provided further, that incidental attorneys fees, if any, are paid to and inure to the benefit of the nonprofit organization.

(B) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer

* * *

APPENDIX 8

Houston Chronicle
Section D, Page 1
Sunday, March 29, 1992

STATE
News & Features

Texas probe zeros in on rehab centers

MARK SMITH
Houston Chronicle

Critics say the hospitals promise the heavens to patients, but deliver much less. They bilk insurance while providing little or no treatment from trained professionals. Then, critics say, when their insurance has been exhausted, patients are unceremoniously dumped.

The critics could be talking about the private psychiatric industry, which has come under local, state and federal scrutiny for alleged abuses.

But they're not.

These are charges now leveled at the nation's rehabilitation facilities by former patients, family members and health care professionals.

"An unethical entity can promise a distraught family anything," said Dr. Catherine Bontke, co-director of the brain injury program for the Institute for Rehabilitation and Research in Houston. "But when the patient doesn't get better, they'll say there is nothing they can do.

"I've run into about a dozen patients where a private facility used up benefits on purpose and (patients) were left without even enough benefits to buy food."

The complaints prompted Texas Lt. Gov. Bob Bullock last week to add an investigation of the rehabilitation industry to a Senate probe of private psychiatric hospitals.

Bullock's action follows the release of a Congressional subcommittee report last month that claimed rehabilitation facilities are wasting hundreds of millions of insurance and patient dollars in costly and inappropriate treatment.

Bontke said patients are often offered "miracle cures" by unethical rehabilitation facilities, then "warehoused" and dumped when their insurance has been used up.

She added she believes regulators have failed to keep pace with the growth in rehabilitation facilities, which have jumped from less than a dozen to about 800 nationally in the past decade.

The number of licensed rehabilitation hospitals in Texas has increased since 1985 from five to 28, Texas Department of Health records show. At least 13 are owned by corporate chains.

"The industry has grown so fast the regulating agencies haven't adapted as quickly," Bontke said. "Government has played a catch-up game.

"People are vulnerable following a near-death experience and someone comes in and offers a miracle cure saying they'll make them well. They (the hospitals) are taking the money and running."

Bontke said she is upset that a program such as the Texas Rehabilitation Commission's Comprehensive Rehabilitation Services fund allows certain chains, such as the

New Medico Health Care Systems' Tyler facility, to be a preferred provider.

"I don't understand they are on the preferred provider list when there have been so many allegations leveled against them during Congressional hearings," Bontke said.

Officials at New Medico, a Massachusetts-based corporation that operates 36 rehabilitation centers in 15 states, have denied any allegations of abuse or improprieties.

Those allegations, not confined to New Medico, include:

- Unethical recruitment of patients, including unrealistic promises and free airplane flights, room and board to families.

- Ambulance chasing. Former marketing staffers claim they were given patient quotas and urged to use newspaper clips and visit emergency rooms to market families of the brain-injured.

- Falsifying treatment records to show patient improvements when, in reality, little or no treatment was provided.

- Joint ventures and doctor-owned facilities. Critics say this leads to a conflict of interest in which physicians may ignore a patient's needs while referring to a facility they own.

- The use of a 30-day agreement by at least one Texas facility in which patients must give notice in order to leave.

State Sen. Mike Moncrief, D-Fort Worth and chairman of the Senate panel charged with investigating rehabilitation facility abuse, said he was disturbed by reports that the Neurobehavioral Institute of Houston's Janus I residential treatment care program required a 30-day notice for at least one patient to leave.

Janus I is owned by National Medical Enterprises, which is being investigated by the Senate panel and the Texas Attorney General's office for psychiatric hospital abuses.

Moncrief said he believes the notices were illegal and were similar to the abuse of "96-hour letters" at NME-owned private psychiatric hospitals.

Former patients told the Senate panel that private psychiatric hospitals forced them to sign the letters to coerce them into staying longer.

[Phote of Moncrief Omitted in Printing]

"Thirty days gives you a lot more time to frighten and intimidate someone into staying in a facility." Moncrief said.

NME spokesman David Olson said the agreement requiring a 30-day notice to leave the program was "not a firm policy" of Janus I.

Olson also added that the agreement is not binding.

"It's an agreement reached before entering the program," he said, to ask patients to commit to a "certain length of treatment."

In a memorandum obtained by the Chronicle, Janus I program director Christine Frey said "the reason we have

a 30-day notice requirement is to give the resident time to reconsider decisions to leave the program against medical advice, and to give families time to make appropriate future plans."

Dr. Kenneth Hoelscher, who worked for both National Medical Enterprises and New Medico, said he believes there are five times the number of facility beds needed to treat brain-injured patients.

Hoelscher also said the facilities are "wildly overpriced" and many – licensed not as hospitals but as nursing homes – should cost about $150 per day, rather than $1,000 per day.

At the National Medical Enterprises facility in Collegeville, Penn., Hoelscher said hospital staff would "lean on me hard to bring people in and threaten to fire me if people are released."

Jim Hudson, who suffered severe head injuries, said he was promised by marketing and therapy staff at a New Medico rehabilitation facility near Tyler that their therapy would enable him to return to work. He also was told facility had three on-site physicians.

Hudson, now 56, said he entered the facility in spring 1991 in what he thought was part of a "pre-evaluation" for a possible fall stay.

During his two-day "visit," Hudson said he saw neither therapy sessions nor doctors.

"In a couple of days out there, I didn't see any real therapy," Hudson said. "All they are concerned about is trying to keep people."

When Hudson said he asked to leave, the staff told him papers he signed prevented him from leaving the facility.

"They said: 'Until we choose it, you don't get out,' " Hudson recalled.

Hudson called his wife and an attorney, but said when he tried to walk out of the building he was surrounded by a marketing staffer and two security guards brandishing night sticks.

After a 45-minute standoff, Hudson said he walked away from them to use the bathroom and realized his wife was waiting in front of the facility. Hudson said he quickly walked out and into the waiting van.

Kathleen Rowe, spokeswoman for New Medico, said the Tyler facility

[last column omitted in printing – illegible on copy]

APPENDIX 9

* * *

[p. 9] HON. LYNN N. HUGHES,

called as a witness by the Defendant, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KILPATRICK

Q. Would you state your name for the record, please, sir?

A. Lynn Hughes.

Q. And how are you employed?

A. I'm a United States District Judge.

Q. In the Southern District of Texas?

A. Yes, sir.

Q. And before you were a United States District Judge, did you – were you a Judge anywhere else?

A. For six years I was a Texas Civil District Judge here in Harris County.

Q. And during that time did you come to know lawyer by the name of Don Kilpatrick?

A. Yes, sir.

Q. And did Don Kilpatrick practice in every

* * *

APPENDIX 10

[p. 27] Q. Would it be against the overwhelming weight of the evidence for you to believe that Don Kilpatrick has a strong desire to help his fellow man?

* * *

[Judge Hughes answers the question.]

[p. 29] A. I think the way to answer that is I believe Don Kilpatrick is idealistic, humane, considerate. And my experience he has never cut a corner for a buck. He has never been in any position where he overreached or overcharged that interest, the question. That's what I know about.

* * *

APPENDIX 11

[p. 15] Q. . . . But there's nothing against your understanding about a brother lawyer helping a brother lawyer?

A. No. I believe that that's part of your affirmative duty to help the Bar.

* * *

APPENDIX 12

NO. 229, 862

GUARDIANSHIP OF BILL ADKINS CAMP, N.C.M.	)	IN THE PROBATE COURT NUMBER TWO (2) OF HARRIS COUNTY, TEXAS

NO. 89-29940

BILL A. CAMP VS. HCA HEALTH SERVICES OF TEXAS, INC., d/b/a HCA WEST HOUSTON MEDICAL CENTER and MEMORIAL RADIOLOGY ASSOCIATES, P.A.	)	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 165TH JUDICIAL DISTRICT

AFFIDAVIT OF C. JAY MORRIS, M.D.

STATE OF TEXAS)
COUNTY OF HARRIS)

KNOW ALL MEN BY THESE PRESENTS:

BEFORE ME, the undersigned authority, on this day personally appeared C. JAY MORRIS, M.D., who is personally known to me, and first being duly sworn according to law upon his oath deposed and said:

> "My name is C. JAY MORRIS, M.D. I am over the age of eighteen (18) years, of sound mind and capable of making this Affidavit. My address is 326 Cinnamon Oak, Houston, Texas 77079. I have never been convicted of a felony. I am a physician licensed to practice medicine in the State of Texas and my license is on file with the appropriate authorities. I have personal

knowledge of the facts stated in this Affidavit and the opinions expressed are based upon my personal knowledge as well as my training, experience and practice as a medical doctor and upon reasonable medical probability.

"I have known Bill Camp personally since January of 1988 and am a personal friend of this individual as well as a treating physician.

"On or about June 13, 1989, Mr. Camp was undergoing a routine barium enema at West Houston Medical Center when he developed a vasovagal episode with a drop in blood pressure and pulse, and subsequent development of intractable seizures. I was the emergency room physician on duty that day and responded to a "code blue" in the Department of Radiolody and had an opportunity to participate in the initial treatment of Mr. Camp. Mr. Camp was admitted to West Houston Hospital for treatment and was subsequently transferred to The Methodist Hospital on June 19, 1989 for tests and treatment. Mr. Camp thereafter was transferred to TIRR for further treatment and rehabilitation.

"Subsequently, I had the occasion to visit Mr. Camp at TIRR, during which time we discussed his retention of Mr. Don Kilpatrick as his attorney for purposes of prosecuting a claim for malpractice. Moreover we discussed other matters regarding Mr. Camp's progress and his desire to make a full recovery. At the particular time I visited Mr. Camp, he acknowledged to me that Don Kilpatrick was his attorney and that he entered into a contract with Mr. Kilpatrick. I had the opportunity to question Mr. Camp concerning this transaction with Mr. Kilpatrick. Based upon my training, experience and personal knowledge, I find him to be oriented to time, place and person. Moreover, he appeared fully

competent to make decisions with regard to the prosecution of his personal injury claim.

"I subsequently had the occasion to speak with Mr. Camp by telephone and again he acknowledged that he had retained Mr. Kilpatrick as his attorney and through questioning by me, appeared competent to make decisions concerning this transaction.

"It is therefore, my opinion, based upon reasonable medical probability, my training, experience and personal observation of Mr. Camp, that this individual, though physically impaired, is mentally competent to enter a contract to prosecute his personal injury claim and is fully capable of understanding and comprehending its ramifications."

Further affiant saith not.

/s/ C. Jay Morris, M.D.
C. J. Morris, M.D.

SUBSCRIBED AND SWORN TO BEFORE ME on this 31st day of August, 1989 to certify which witness my hand an [sic] seal of office.

/s/ Marilyn Houser
Notary Public in and
for The State of TEXAS

My Commission Expires:

2-13-92

[SEAL] MARILYN HOUSER
NOTARY PUBLIC
STATE OF TEXAS
MY COMMISSION EXPIRES
FEB. 13, 1992

APPENDIX 13

Joseph D. JAMAIL, Appellant,

v.

James Richard THOMAS et al., Appellees.

No. 15882

Court of Civil Appeals of Texas,
Houston (1st Dist.).

April 20, 1972.

Rehearing Denied May 25, 1972.

Second Rehearing Denied June 15, 1972.

Attorney brought suit against insurer, its agents and husband and wife for tortious interference with contract of employment which had been signed by husband. The District Court, Harris County, Arthur C. Lester, Jr., J., rendered judgment that attorney take nothing, and attorney appealed. The Court of Civil Appeals, Bell, C. J., held that in absence of actual authority, husband could not assign, in employment agreement with attorney, percentage of wife's interest in her cause of action arising from automobile accident, and attorney was not entitled to recover for tortious interference with employment contract.

Affirmed; motion for rehearing overruled.

Coleman, J., filed concurring opinion on motion for rehearing.

1. Husband and Wife – 138(3), 265

The mere relationship of husband and wife does not give husband authority to contract with regard to wife's

separate property or community property committed by law to her sole management, control and right of disposition. Vernon's Ann.Civ.St. art. 4621; V.T.C.A. Family Code, § 5.22; Vernon's Ann.St. Const. art. 16, § 15.

2. Husband and Wife – 138(3)

In absence of actual authority, husband could not assign, in employment agreement with attorney, percentage of wife's interest in her cause of action arising from automobile accident. Vernon's Ann.Civ.St. arts. 4615, 4621; V.T.C.A. Family Code §§ 5.01, 5.22.

3. Husband and Wife – 260

Under statute, a recovery for personal injuries by a spouse is his or her separate property, except for loss of earning capacity during the marriage. Vernon's Ann.Civ.St. art. 4615; V.T.C.A. Family Code, § 5.01.

4. Husband and Wife – 209(3)

Under statute, the wife has the sole right to manage, control and dispose of her cause of action to recover damages for personal injuries, including injury to the physical structure of the body, physical pain, mental anguish, loss of earnings and impaired earning capacity. Vernon's Ann.Civ.St. art. 4621; V.T.C.A. Family Code, § 5.22.

5. Husband and Wife – 265, 267

Where statute gave to husband or wife the sole management, control and disposition of that community property which husband or wife would have owned if single, and where wife would have been liable for hospital and medical bills or owned any recovery for them, wife had sole management, control and right of disposition of recovery for hospital and medical bills arising from automobile accident, and husband could not assign, in employment agreement with attorney, percentage of wife's interest in cause of action arising from accident. Vernon's Ann.Civ.St. art. 4621; V.T.C.A. Family Code, § 5.22.

6. Contracts – 134
Principal and Agent – 166(1)

Ratification of an agreement or act requires that a party alleged to have ratified it have full knowledge of all the facts.

7. Principal and Agent – 170(1)

"Acquiescence" is merely evidence of ratification of an agreement.

See publication Words and Phrases for other judicial constructions and definitions.

8. Trial – 219, 261

Instruction defining "ratified" as approval by act, word, or conduct, with full knowledge of the facts, of the

prior act, with intention of giving validity to such prior act, was correct, and refusal to include "acquiescence" in definition and refusal to give requested definition which was not substantially correct was not error.

See publication Words and Phrases for other judicial constructions and definitions.

On Motion For Rehearing

9. Attorney and Client – 27

Attorney seeking to recover for tortious interference with employment contract signed by husband but not by wife who had sustained injuries had burden to establish that included in payments by an insurer to husband and wife were damages over which husband had control, and also to establish the amount thereof, and in absence of such showing, attorney could not recover.

10. Husband and Wife – 262(1)

In absence of showing that included in payments made by insurer to husband and wife were damages over which husband, who had signed employment contract with attorney, had control, where pleadings and proof were that all injuries were to wife, who did not make or ratify contract with attorney, who subsequently brought suit against insurer, its agents, and husband and wife for tortious interference with employment contract, fact that insurer's settlement checks were payable to both and husband and wife did not create presumption that each was entitled to receive one-half. V.T.C.A. Family Code, § 5.22.

Jamail & Gano, Don Barnett, Houston, for appellant.

Fulbright, Crooker & Jaworski, William H. Young, Houston, for appellees.

BELL, Chief Justice.

Appellant, an attorney, filed suit against appellees, Aetna Life & Casualty Company, Norman Chersky, Ronald Easley and James Richard Thomas, to recover damages for tortious interference with a contract of employment. The court, based on a jury verdict, rendered a judgment that appellant take nothing. Easley and Chersky were claim adjusters for Aetna.

On September 15, 1968, an automobile driven by James Richard Thomas hit the automobile owned and driven by Tommy Cochran. There was a rear end collision. The Cochrans' automobile was also occupied by Mrs. Cochran and a small child of the Cochrans. The next day Mrs. Cochran, who was injured, was taken to a hospital where she remained about three weeks. At the time, Mr. and Mrs. Cochran were separated and a divorce suit was pending. They later became reconciled and a divorce was never granted. On September 16, Mr. Cochran went to appellant's office and talked to Mr. Barnett, an associate of appellant. At that time Cochran employed appellant as an attorney. The power of attorney was signed by Tommy Cochran only. It purported to employ appellant to represent the Cochrans in "my (our) claim for damages against all responsible parties because of our injuries and damages . . . " The contract was a contingent fee one and assigned to appellant a 40% interest in "my (our) cause of action" if suit was filed and recovery was finally had without an appeal.

Aetna, Mr. Thomas' insurer, on January 6, 1969, made a settlement with Mr. and Mrs. Cochran and took a release signed by both of them. The release recited a total payment of $6,675.27. Its clear language effected a release by Mr. and Mrs. Cochran of any claims they had by reason of the collision.

In February, 1969, appellant filed suit against Thomas on behalf of Mr. and Mrs. Cochran. That petition is not in the record. Sometime after appellant learned of the settlement and release the suit was dismissed.

Appellant then filed this suit to recover his damages allegedly resulting from tortious interference by the appellees with his contract of employment. He went to trial on his Third Amended Original Petition. In the petition he alleged that "Thomas was guilty of negligence which proximately caused the collision . . . and resulting injuries and damages to Mr. and Mrs. Tommy Cochran . . . " Then followed a specification of the acts of negligence.

In the paragraph alleging injuries appellant asserted that in the collision Mrs. Cochran received injuries to her neck which caused her disability to such an extent that she could not carry on her duties as a housewife and the injuries caused her physical pain and mental anguish. It was alleged that Mrs. Cochran was hospitalized and that Mr. and Mrs. Cochran incurred medical bills.

Appellant then alleges he "was employed to represent Mr. and Mrs. Cochran in their claim for damages arising out of the collision . . . " Appellant then asserts he filed suit in their behalf for recovery "for their losses and

physical pain, mental suffering, impairment of the duties of a housewife and medical bills . . . "

In his prayer appellant asked to recover 40% of the amount which probably would have been awarded to Mr. and Mrs. Cochran, or, alternatively, asked for 40% of the amount actually paid to Mr. and Mrs. Cochran by Aetna. Exemplary damages of $5,000.00 were asked.

The evidence shows that Mrs. Cochran received a neck injury and was hospitalized about three weeks. She was off from her work longer than that. Mr. Cochran was not injured. His automobile was damaged but the cost of repairs is not shown. The amount of the doctors' and hospital bills is not shown.

It appears that immediately Mr. Chersky contacted Mrs. Cochran at the hospital. Aetna determined their insured was probably liable. Aetna ascertained the net weekly earnings of Mrs. Cochran from her employment were $60.00 and started paying $120.00 per week. Some of the drafts were payable to Mr. and Mrs. Cochran and some to "Claimant." About January 6, 1969, a settlement was agreed on by Mrs. Cochran. A final payment of $4,820.00 was made. The check with a release was sent to Mr. and Mrs. Cochran. The release was to be signed by both Mr. and Mrs. Cochran and the check was payable to both. When the release was not timely returned, Aetna stopped payment on the check. Mr. Easley then took a release to the Cochran home and obtained the signature of both parties and then paid them $4,820.00. The total payment directly to the Cochrans including weekly payments was $6,675.27.

We feel the evidence conclusively establishes that Aetna, through Chersky and Easley, had knowledge of appellant's employment by Mr. Cochran. They nevertheless continued their negotiations with Mrs. Cochran. They never negotiated with Mr. Cochran except to obtain signing of the release. While Mrs. Cochran did not sign the contract she knew of it. An issue was raised by the evidence as to whether she ratified it.

The jury, in response to special issues, made, in effect, the following answers:

1. Issue No. 1. Failed to find that Mrs. Cochran ratified the contract.

2. Special Issue No. 2. Failed to find that Aetna through its representatives knowingly interfered with performance of the contract by securing the signing of the release by Tommy Cochran.

3. Issue No. 3. Failed to find that Aetna through its representatives knowingly interfered with performance of the contract by securing of the signing of the release by Mrs. Cochran.

Issue 4 was conditioned on an affirmative answer to Issue No. 2, and inquired as to whether Aetna acted with conscious indifference to the rights of appellant. Issue No. 6 was the compensatory damage issue and was conditioned on an affirmative answer to Issue No. 2. Issue No. 8 was the exemplary damage issue and was conditioned on an affirmative answer to Issue No. 4. These issues were unanswered because of the manner in which they were conditioned. All of these issues relate to recovery based on the conduct of Aetna insofar as Aetna

allegedly interfered with the contractual relation between appellant and Mr. Cochran.

The other issues relate to the contractual relation between appellant and Mrs. Cochran. Specific notice of them is unnecessary in the light of the jury's failure to find ratification.

We are of the view that the terms of the contract are broad enough to encompass all of the damages resulting to both Mr. and Mrs. Cochran. We are also of the view that the release was effective to release all claims for all damages.

Appellant by his first four points of error asserts it was conclusively established that there was tortious interference with performance by obtaining the release from Mr. and Mrs. Cochran, and the trial court erred in rendering judgment against appellant and in refusing to grant appellant's motion for judgment notwithstanding the verdict, his motion for instructed verdict and his motion for new trial.

A reference to the motion for instructed verdict and for judgment notwithstanding the verdict reveals that appellant's theory was that the contract was between Mr. and Mrs. Cochran and him in that Mr. Cochran had contracted for himself and Mrs. Cochran with authority of Mrs. Cochran. This was also the theory plead.

There is no evidence showing actual authority and the mere relationship of husband and wife does not give the husband authority to contract with regard to the wife's separate property or community property committed by law to her sole management, control and right of

disposition. Taylor v. Gilbert Gerner Enterprises, 466 S.W.2d 337 (Tex.Civ.App. – Houston, 1st), ref., n. r. e. The huaband could not assign the wife's interest in her cause of action.

Appellees urge that all recovery by the wife for personal injury, except loss of earning capacity during the marriage, is her separate property under Article 4615, Vernon's Ann.Civ.St., which was in effect at the time the injuries were received. This article is now Section 5.01 of the Texas Family Code, V.T.C.A. Also appellees cite Smith v. Smith, 473 S.W.2d 299 (Tex.Civ.App. – Texarkana), ref., n. r. e.; Kirkpatrick v. Hurst, 472 S.W.2d 295 (Tex.Civ.App. – Texarkana) writ granted on another point.

We need not determine whether Aetna's payments directly to Mr. and Mrs. Cochran were her separate property.

As we read the record the payments made directly to the Cochrans were for damages for injuries received by Mrs. Cochran, including lost earnings up to the time of the release and in the future, if any, and physical pain and mental anguish. The record is confusing as to whether payment of hospital and doctors' bills was made directly to the creditor or was included in the payment to the Cochrans. In our view it makes no difference in the light of our holding.

Article 4621, V.A.T.S., in effect at all material times (now Section 5.22 Texas Family Code), reads as follows:

> "During marriage each spouse shall have sole management, control and disposition of that *community property which he or she would have owned if a single person* (emphasis ours

> unless otherwise stated), including (but not limited to) . . . the recoveries for personal injuries awarded to him or her . . . "

The effect of this statute is to define the rights of each spouse with regard to community property. It does not deal with what constitutes separate property. It suffices to say that Article 4615 makes a recovery for personal injuries by a spouse his or her separate property except for loss of earning capacity during the marriage.

In the landmark case of Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799, our Supreme Court held that Article 16, Section 15, Texas Constitution, Vernon's Ann.St., permitted the legislature to pass laws more clearly defining the wife's rights with regard to her separate property as well as that held in common with her husband.

The Texas cases cited by appellee, that we have above noticed, all deal with recovery by the wife for physical injury to the body, physical pain and mental anguish and damages for such injuries were held to be her separate property. The case of Franco et ux. v. Graham, 470 S.W.2d 429 (Tex.Civ.App. – Corpus Christi), writ granted, held the same and the opinion contained a statement that medical expenses were not included as an element of recovery as separate property under the term "the recovery awarded for personal injuries."

We hold that by virtue of Article 4621, the wife has the sole right to manage, control and dispose of her cause of action to recover damages for personal injuries which would clearly include injury to the physical structure of the body, physical pain, mental anguish, loss of earnings and impaired earning capacity. We also hold that under

the facts of this case Mrs. Cochran had sole management, control and right of disposition of recovery for hospital and medical bills.

Whether the term "the recovery for personal injuries" standing alone includes such consequential damages as hospital and medical bills, we need not decide. Article 4621 gave "sole management, control, and disposition of that community property that" the husband or wife "would have owned if single." All of the items of recovery above listed would belong to the injured wife, if she had been single. She would be liable for hospital and medical bills either because of her contract or because of necessaries furnished. She would, were she single, own any recovery for them.

Professor Joseph W. McKnight, writing in 22 Southwestern Law Journal, at page 132, reaches the following conclusion:

> " . . . article 4621 provides that *all types* of recoveries for personal injuries are subject to the management, control and disposition of the person injured. The provisions of article 4615, dealing with ownership of the recovery, should be clearly distinguished from the management provisions of article 4621 . . . Article 4621 . . . does give the injured spouse management, control, and disposition over all of a personal injury recovery whether such recovery is community or separate or both. Regardless of characterization of various aspects of personal injury recoveries as separate or community property, *the injured spouse has the sole power to settle a dispute as to liability because of his or her management powers. . . .* "

APPENDIX 14

[December 1982 State Bar of Texas]

CHAPTER 4

TEMPORARY GUARDIANSHIP

PART A. PURPOSES AND USES OF TEMPORARY GUARDIANSHIP

§ 4:02 Use to Avoid Regular Permanent Guardianship

The courts in some Texas jurisdictions have not limited the appointment of temporary guardians to emergency situations and, by a liberal interpretation of the Probate Code, have permitted temporary guardianship to be used as a device to avoid full-scale permanent guardianship. *See* Tex. Prob. Code Ann. § 131(c) (Vernon 1980) (allowing temporary guardianships to continue in force indefinitely at the court's discretion). However, because of the very limited powers of the temporary guardian, this is not recommended procedure. The powers of a temporary guardian must be stated in the order of appointment, and the temporary guardian may not perform any acts not specifically authorized by the court. *Id.* § 131(a) & (b). Further, the temporary guardian must comply with the applicable provisions of the Probate Code governing other types of guardianships. *Id.* § 133(b).

APPENDIX 15

§ 4:03 Constitutionality of Procedure

The procedure authorized by Tex. Prob. Code Ann. § 131 (Vernon 1980) to establish a temporary guardianship has been attacked as violative of federal constitutional due process in both state and federal courts. However, in none of these cases has the issue been directly addressed.

In *Krause v. White*, 612 S.W.2d 639 (Tex. Civ. App. – Houston [14th Dist.] 1981, writ ref'd n.r.e.), although the court found that it lacked jurisdiction because the appeal was not timely filed, it expressed doubt that sections 131 and 133 are constitutional and suggested legislative revision. *Id.* at 644. The same court had also refused in an earlier case to rule on the constitutionality of section 131 after determining that the cause of action was moot. *Calaway v. Foxhall*, 603 S.W.2d 363 (Tex. Civ. App. – Houston [14th Dist.] 1980, no writ). In *Mason v. Barnard*, 381 S.W.2d 85 (Tex. Civ. App. – San Antonio 1964, writ ref'd n.r.e.), the court found it unnecessary to decide the constitutionality of section 131 because the ward had been found incompetent at trial and the temporary guardianship had been made permanent. *Id.* at 86.

On the other hand, the predecessor statute to section 131, 1905 Tex. Gen. Laws, ch. 15, § 1, at 18, under which the rights and powers of a temporary guardian were the same as those of a permanent guardian and could not be limited by the order of appointment, was upheld when attacked as violating due process and denying the ward equal protection. *McKinley v. Salter*, 136 S.W.2d 615 (Tex. Civ. App. – El Paso 1940, writ dism'd), *appeal dism'd*, 312 U.S. 659 (1941). In *McKinley*, the temporary guardian sold

realty belonging to the minor wards before notice and citation of the guardian's appointment had been issued. The court held that the legislature, by giving a temporary guardian power to dispose of ward's property had not denied the ward equal protection of the laws. Rather, the court stated that the legislature had given the ward the benefit of laws especially designed for his protection. *Id.* at 624-25 *see also Henderson v. Shell Oil Co.*, 208 S.W.2d 863 (Tex. 1948), *cert. denied*, 335 U.S. 884 (1948) (due process satisfied in proceeding in rem by constructive service on nonresident, incompetent ward). It should be noted that since the *McKinley* case was decided in 1940, the rights granted by the due process clause of the fourteenth amendment to the U.S. Constitution have been greatly expanded.

In *Dahl v. Akin*, 630 F.2d 277 (5th Cir. 1980), *cert. denied*, ___ U.S. ___, 101 S. Ct. 1977, 68 L. Ed. 2d 296 (1981), an allegedly incompetent person sought damages under federal civil rights law (42 U.S.C.A. § 1983 (West 1981)) for deprivation of liberty and property without due process. In that case the plaintiff's daughter obtained a temporary guardianship through ex parte proceedings and, in her capacity as temporary guardian, had him involuntarily committed to a mental health facility and obtained court authorization to take possession of his residence. Although the Fifth Circuit found deprivation of liberty and property without procedural due process, constituting "state action" under the federal civil rights laws, it upheld the trial court's dismissal of the case because the daughter was not acting "under color of" state law. *Dahl v. Akin*, 630 F.2d 277, 279 (5th Cir. 1980),

cert. denied, ___ U.S. ___, 101 S. Ct. 1977, 68 L. Ed. 2d 296 (1981).

PART B. APPOINTMENT OF TEMPORARY GUARDIAN

§ 4:11 Appointment and Qualification of Temporary Guardian

A temporary guardian has only the powers specifically set forth in the order of the court appointing him. Tex. Prob. Code Ann. § 131(b) (Vernon 1980). As soon as the temporary guardian takes and files an oath and the bond is filed and approved, the clerk of the court will issue Letters of Temporary Guardianship, which also specify the rights and powers of the temporary guardian. *Id.* The order of preference among proposed guardians designated in *id.* § 109 and the disqualifications established in *id.* § 110 apply to temporary guardianships. *Blackburn v. Gantt*, 561 S.W.2d 269 (Tex. Civ. App. – Houston [1st Dist.] 1978, no writ); *see* Tex. Prob. Code Ann § 133(b) (Vernon 1980) (temporary guardianships governed by all applicable provisions of Probate Code).

§ 4:12 Citation and Notice

Citation is issued and posted immediately after appointment of the temporary guardian, giving all interested persons an opportunity to contest the appointment if they so desire. Tex. Prob. Code Ann. § 131(d) (Vernon 1980). In addition, personal service of citation on interested persons may be necessary. *Id.* If no contest of the appointment is made within the time specified in the citation, the temporary guardianship may continue for as long as the

court deems it to be in the interest of the ward or the ward's estate, or until it is made permanent. *Id.*

APPENDIX 16

629-28-1777

629-27-1133

No. 229862

GUARDIANSHIP OF BILL ADKINS CAMP N.C.M.	IN THE PROBATE COURT NUMBER 2 OF HARRIS COUNTY, TEXAS

ORDER

On this day came on to be considered the Application of SUSIE VARNELL CAMP for Letters of Temporary Guardianship of the Person and Estate for BILL ADKINS CAMP and the Court after hearing and considering the application and evidence submitted, finds that and [sic] imminent danger exists for the appointment of a Temporary Guardian pursuant to Section 131 of the Texas Probate Code; that SUSIE VARNELL CAMP is not disqualified to act as such Temporary Guardian, that it is in the best interest of said Ward, and that his estate must be cared for and that the Court has jurisdiction over the subject matter and over persons whom the law requires jurisdiction be had;

It is therefore ORDERED, ADJUDGED and DECREED that SUSIE VARNELL CAMP is hereby appointed Temporary Guardian of the Person and Estate of BILL ADKINS CAMP until 19 day of ~~June~~ August /s/ PG, 1989, and that Letters of Temporary Guardianship be issued to her giving bond in the sum of $530,000.00,

which is the proper sum hereby ordered fixed in accordance with the requirements of law and the taking of oath as required by law.

The Temporary Guardian shall have the following powers:

1. To collect and protect the assets of the Estate.

2. To obtain any and all necessary physical and/or medical care on behalf of the Ward.

3. To appoint Alan Cohen, a licensed attorney in the State of Texas to operate the Law Offices of BILL ADKINS CAMP, ~~and he shall not be liable for his acts or omissions, except for willful misconduct of Illegible.~~

4. To extend funds in the amount of not to exceed $15,000.00 for the next twenty days for operations of the office and personal expense subject to further orders of this court. [Number 4 handwritten on Order.]

It is further ORDERED that Nancy Ligh whose address is 3303 Main Houston 77002, an attorney licensed to practice before this Court, is appointed the attorney ad litem to represent the interest of the Ward named herein.

It is further ORDERED that a hearing be held on the Application for Temporary Guardianship on the 30th day of June, 1989, at 8:30 o'clock, in the Courtroom of Probate Court No. 2, 1115 Congress, Houston, Harris County, Texas at which time the necessity for this Temporary Guardianship will be determined.

It is further ORDERED by the Court that the Clerk of this Court issue Letters of Temporary Guardianship to

SUSIE VARNELL CAMP when she has qualified according to law.

SIGNED this 20 day of June, 1989.

/s/ Pat Gregory

Recorder's Memorandum All Blackouts, additions and changes were present at the time the instrument was filed and recorded.

22844

OFFICE OF ANITA RODEHEAVER, COUNTY CLERK,
HARRIS COUNTY, TEXAS
PROBATE COURTS DEPARTMENT

OATH OF GUARDIAN

629-33-1969

(Filed June 27, 1989)

THE STATE OF TEXAS § DOCKET NO. 229862
§
COUNTY OF HARRIS § ESTATE OF:
BILL ADKINS CAMP

I, SUSIE VARNELL CAMP, do solemnly swear that I will faithfully discharge the duties of guardian of the person and/or estate of BILL ADKINS CAMP according to law.

/s/ Susie Varnell Camp
Guardian

[Seal]
Sworn to and subscribed before me on June 27, 1989.

ANITA RODEHEAVER, Clerk
Probate Court No. 2.
Harris County, Texas

By /s/ Illegible
Deputy

APPENDIX 17

CAUSE NO. ___

BILL A. CAMP	§	IN THE DISTRICT
	§	COURT OF HARRIS
V.	§	COUNTY, TEXAS
	§	
HCA HEALTH SERVICES	§	
OF TEXAS, INC. D/B/A	§	___ JUDICIAL DISTRICT
HCA WEST HOUSTON	§	
MEDICAL CENTER, AND	§	
MEMORIAL RADIOLOGY	§	
ASSOCIATES, P.A.	§	

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW BILL A. CAMP, hereinafter referred to as Plaintiff complaining of HCA HEALTH SERVICES OF TEXAS, INC., D/B/A HCA WEST HOUSTON MEDICAL CENTER, AND MEMORIAL RADIOLOGY ASSOCIATES, P.A. Defendants herein for cause of action as follows:

I.

Plaintiff BILL A CAMP, is a resident of Houston, Harris County, Texas.

The Defendant HCA HEALTH SERVICES OF TEXAS, INC., D/B/A WEST HOUSTON MEDICAL CENTER is a health care provider and does business in Houston, Harris County, Texas and may be served with citation by serving its registered agent for service, C.T. Corporation Systems, 1601 Elm Street, Dallas, Texas 75201.

The Defendant MEMORIAL RADIOLOGY ASSOCIATES P.A. is a Texas Corporation and does business in Houston, Harris County, Texas and may be served with citation by serving its registered agent, Frank M. Rembert, 7777 S. W. Freeway, Suite 46-C, Houston, Texas 77074.

II.

It has become necessary to bring this action because of injuries and damages sustained by the Plaintiff while Plaintiff was under the medical care of the Defendants. On the occasion in question, Plaintiff was caused to sustain serious injuries and damages as a proximate result of the negligence of Defendants. The Defendants were negligent in the administration of medical services, which was a proximate cause of Plaintiff's injuries and damages.

III.

Plaintiff would show that all conditions precedent to the filing of this action has been satisfied, and that Plaintiff has complied with the requirements of Article 4590i, et seq. of the Revised Civil Statutes of Texas.

IV.

Upon trial of this case, it will be shown that Plaintiff was caused to sustain injuries and damages as a proximate result of Defendants' negligence; and Plaintiff will respectfully request that the Court and Jury determine the amount of the Loss Plaintiff has incurred in the past and will incur in the future, not only from a financial

standpoint, but also in terms of good health and freedom from pain and worry. Plaintiff is entitled to have the Jury in this case separately consider the following elements of damages:

1 The physical pain that Plaintiff has suffered from the date of the incident in question up to the time of trial.

2. The mental anguish that Plaintiff has suffered from the date of the incident in question up to the time of trial.

3. The amount of reasonable medical expenses and custodial care necessarily incurred in the treatment of Plaintiff's injuries from the date of the incident in question up to the time of trial.

4. The loss of any earnings sustained by Plaintiff from the date of the incident in question up to the time of trial.

5. The damages resulting from the physical impairment suffered by Plaintiff and the resulting inability to so [sic] those tasks and services that Plaintiff ordinarily would have been able to perform.

6. The physical disfigurement that Plaintiff has suffered from the date of the incident in question up to the time of trial.

7. The physical pain that Plaintiff will suffer in the future beyond the time of trial.

8. The mental anguish that Plaintiff will suffer in the future beyond the time of trial.

9. The reasonable value of medical expenses and custodial care that will necessarily be

incurred in the treatment of Plaintiff's injuries in the future beyond the time of trial.

10. The loss or reduction in Plaintiff's earnings or earning capacity in the future caused by the injuries sustained in the incident in question.

11. The damages resulting from the physical impairment that Plaintiff will continue to suffer in the future and the resulting inability to do those tasks and services that Plaintiff ordinarily would have been able to perform in the future beyond the time of trial.

12. The physical disfigurement that Plaintiff will suffer in the future beyond the time of trial.

V.

Because of all the above and foregoing, Plaintiff has been damaged and will continue to be damaged in a sum greatly in excess of the minimal jurisdiction of the Court for which amount Plaintiff now brings suit.

VI.

In addition and/or in the alternative your Plaintiff would show that the actions and/or inactions of the Defendants as aforesaid were of such character as to constitute gross negligence. The actions of Defendants involve such an entire want of care which would raise the belief that the acts and/or omissions complained of were the result of a conscious indifference to the rights, welfare, or safety of your Plaintiff. Your Plaintiff here and

now respectfully sues for exemplary damages in a sum of money in far excess of the minimum jurisdictional limits of this Court and he does sue for these monies in addition to all other sums herein plead for.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendants be cited to appear and answer herein, and that upon final trial, Plaintiff recover the damages, as specified above, from the Defendants, both jointly and severally, plus costs of Court, pre-judgment and post-judgment interest at the legal rate, and have such other and further relief, general and special, at law and in equity, to which Plaintiff may show himself justly entitled under the facts and circumstances.

Respectfully submitted,

HORNBUCKLE & MONTGOMERY

BY: /s/ Anthony P. Montgomery
Anthony P. Montgomery
SBOT: 14287300
1301 McKinney, Suite 3650
Houston, Texas 77010
(713) 651-1980

BY: /s/ Thomas S. Hornbuckle
Thomas S. Hornbuckle
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1301 McKinney, Suite 3650
Houston, Texas 77010
(713) 651-1980

Attorneys for Plaintiff

APPENDIX 18

634-40-1928

Pers. CR.26162

NO. 229,862

PROBATE COURT NO. 2

GUARDIANSHIP OF BILL ADKINS CAMP, N.C.M.	§ § § § §	IN THE PROBATE COURT NUMBER TWO (2) OF HARRIS COUNTY, TEXAS

MOTION FOR DONALD E. KILPATRICK TO SHOW AUTHORITY

(Filed Nov. 1, 1989)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW SUSIE VARNELL CAMP, Guardian of the Person and Estate of Bill Adkins Camp, N.C.M. (the "Guardian"), and files this Motion pursuant to Rule 12 of the Texas Rules of Civil Procedure, and requests that this Court issue an order to Donald E. Kilpatrick, Attorney at Law ("Kilpatrick"), to appear before this Court and show his authority to represent Bill Adkins Camp, N.C.M., or the Guardian on behalf of Bill Adkins Camp, N.C.M., or to hire counsel to represent Bill Adkins Camp, N.C.M., or his Guardian in the prosecution of a lawsuit against HCA Health Services of Texas, Inc., d/b/a HCA West Houston Medical Center and Memorial Radiology Associates, P.A. In support of this Motion to Show Authority, the Guardian would show unto the Court the following:

I.

Donald E. Kilpatrick may be served with citation and other process at his law office at 8705 Katy Freeway, Suite 408, Houston, Texas 77024.

II.

On or about June 13, 1989, Bill Camp was at HCA West Houston Medical Center for routine medical tests. During the course of those tests, he suffered significant permanent injuries which rendered him incompetent. Susie Camp was appointed Temporary Guardian of the Person and Estate of Bill Adkins Camp, N.C.M., on June 20, 1989, and Permanent Guardian on September 1, 1989.

III.

Approximately a month after the Guardian's appointment, on or about July 19, 1989, Kilpatrick obtained the signature of Bill Camp on a "contract of employment". Although notified by the Guardian and her counsel, both by telephone and in writing, that Mr. Camp was incompetent and that a guardianship had been created, Kilpatrick has insisted that he has a valid "contract". Although requested to do so, Kilpatrick has refused to return the "contract" to the Guardian or her counsel or to void the "contract". Attached hereto and incorporated herein as Exhibit "A" is a copy of the correspondence to Kilpatrick requesting that he return the contract in question. Kilpatrick responsed [sic] to this request by demanding money from the Guardianship in exchange for his "contract".

IV.

Not only has Kilpatrick refused to turn over the "contract", he has also solicited the Guardian, requesting that she meet with him, and/or the law firm of Hornbuckle & Montgomery. Kilpatrick, apparently fearing that his trial skills were inadequate and insufficient, had retained Messrs. Hornbuckle and Montgomery to file suit on behalf of Bill Camp. When Hornbuckle & Montgomery were informed that the Guardian did not wish to retain them, and that she believed that Kilpatrick had an invalid contract, they agreed to withdraw from the case once a new attorney has been retained. The Guardian has reason to believe that Messrs. Hornbuckle and Montgomery will stand by their statement and that they will withdraw upon the retention of new counsel. Accordingly, Hornbuckle & Montgomery are not a party to this Motion.

V.

At no time during the guardianship has the Guardian in any was indicated to Kilpatrick that he had authority to prosecute a claim on her husband's behalf. Kilpatrick's actions have created a tremendous mental strain and anguish for the Guardian and her family. Kilpatrick's actions have added to the burden the Guardian already has in knowing that her husband has suffered a significant injury and physical impairment.

The Guardian is seeking counsel to prosecute the medical malpractice case on her husband's behalf. In seeking counsel, the Guardian feels compelled to explain the problem created by Kilpatrick. To her dismay, the Guardian has learned, upon explanation of the situation created by Kilpatrick, that she cannot obtain counsel to

represent her husband. The Guardian has found no attorney will agree to work on this case until there is a resolution of the problem with Kilpatrick. The Guardian has attempted to resolve the matter informally, but Kilpatrick is resolute in his refusal to relinquish the "contract". The Guardian has requested Kilpatrick contact her counsel and cease action on behalf of Bill Camp. See Affidavit of Susie Varnell Camp attached hereto and incorporated herein for all purposes. The Guardian has no other choice but to seek the Court's assistance in resolving this matter.

VI.

The Guardian would show unto the Court that as long as Kilpatrick maintains he has some interest in Bill Camp's suit against HCA Health Services of Texas, Inc., d/b/a HCA West Houston Medical Center and Memorial Radiology Associates, P.A., the Guardian cannot go forward with that action. It is likely that Bill Camp will need medical care and nursing supervision the rest of his life, so the Guardian is before this Court with an urgent need to eliminate Kilpatrick's interest and/or involvement in the matter. Kilpatrick's participation either directly or indirectly in Bill Camp's case against HCA Health Services of Texas, Inc., d/b/a HCA West Houston Medical Center and Memorial Radiology Associates, P.A., is unwarranted, unjustified and without authority. Kilpatrick's stubborn refusal to yield justifies the use of Rule 12 of the Texas Rules of Civil Procedure by this Court.

VII.

Further, due to the egregious acts by Kilpatrick, the Guardian has been forced to obtain counsel to represent her in this Motion to Show Authority. Pursuant to Rule 12 of the Texas Rules of Civil Procedure and the relevant case law, the Guardian is entitled to recover from Kilpatrick her reasonable and necessary attorney fees for the prosecution of this Motion against him.

WHEREFORE, PREMISES CONSIDERED, SUSIE VARNELL CAMP, Guardian of the Person and Estate of Bill Adkins Camp, N.C.M., prays that this Court grant all or a portion of the following relief:

1. Donald E. Kilpatrick be required to appear before this Court and show cause why he has authority to act on behalf of Bill Adkins Camp or his Guardian and prosecute an action, either directly or indirectly;

2. Donald E. Kilpatrick be required to appear and show cause why he should not turn over the original contingency fee contract and/or power of attorney allegedly signed by Bill Adkins Camp, N.C.M., and all other contracts with third parties which derived from the original contract;

3. If Donald E. Kilpatrick should fail to show authority, as ordered by this Court, this Court enter an Order refusing to permit Donald E. Kilpatrick to appear in *Bill Adkins Camp v. HCA Health Services of Texas, Inc., d/b/a HCA West Houston Medical Center and Memorial Radiology Associates, P.A.*, or any similar action on behalf of Bill Adkins Camp, N.C.M., against those parties;

4. If Donald E. Kilpatrick should fail to show authority, as ordered by this Court, this Court enter an Order striking the pleadings in *Bill Adkins Camp v. HCA*

Health Services of Texas, Inc., d/b/a HCA West Houston Medical Center and Memorial Radiology Associates, P.A., without prejudice to refiling same;

5. If Donald E. Kilpatrick should fail to show authority, as ordered by this Court, this Court enter an Order declaring that the contract and/or power of attorney with Kilpatrick and all contracts or agreements by Kilpatrick with any other attorneys or law firms regarding Bill Camp's claims against HCA Health Services of Texas, Inc., d/b/a HCA West Houston Medical Center and Memorial Radiology Associates, P.A., are null and void and have no effect in that Bill Camp was incompetent when they were signed; and

6. That the Guardian recover her reasonable and necessary attorneys' fees from Donald E. Kilpatrick for the prosecution of this Rule 12 motion and for such other and further relief which the Guardian may be entitled to receive.

Respectfully submitted,

BAKER, BROWN, SHARMAN & PARKER

By: /s/ Robert S. MacIntyre, Jr.
ROBERT S. MACINTYRE, JR.
State Bar Number 12760700
DARLENE PAYNE SMITH
State Bar Number 18643525
3600 Citicorp Center
1200 Smith Street
Houston, Texas 77002
713/654-8111

ATTORNEYS FOR
SUSIE VARNELL CAMP

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was sent by United States certified mail, return receipt requested, on this 1st day of November, 1989, to Messrs. John L. Hopwood and John Colson, Liddell, Sapp, Zivley, Hill & LaBoon, 3500 Texas Commerce Tower, Houston, Texas 77002-3095; Mr. Thomas S. Hornbuckle, Hornbuckle & Montgomery, 1301 McKinney, Suite 3650, Houston, Texas 77010; Mr. James Wykoff, Wykoff, Russell & Frazier, 1800 Texas American Building, Houston, Texas 77002; and Mr. Alan Cohen, 1601 Westheimer, Houston, Texas 77006.

/s/ Darlene Payne Smith
DARLENE PAYNE SMITH

APPENDIX 19

634-40-1935

AFFIDAVIT

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared SUSIE VARNELL CAMP, Guardian of the Person and Estate of Bill Adkins Camp, N.C.M., who, being by me duly sworn, deposed and under oath stated as follows:

"1. My name is SUSIE VARNELL CAMP. I am over the age of twenty-one (21) years, am of sound mind, and am competent to make this Affidavit.

"2. I have never been convicted of any criminal offense, and I have personal knowledge of the facts stated herein and know that the facts stated herein are all true and correct.

"3. I am the Guardian of the Person and Estate of Bill Adkins Camp, N.C.M., and was appointed by Order of Probate Court Number Two (2) dated June 20, 1989. At all times since June 20, 1989, I have acted as Guardian of the Person and Estate of Bill Adkins Camp.

"4. At the present time, I am seeking counsel to represent me as Guardian for Bill to represent his interest in an action against HCA Health Services of Texas, Inc., d/b/a HCA West Houston Medical Center and Memorial Radiology Associates, P.A. An action against HCA Health

Services of Texas, Inc., d/b/a HCA West Houston Medical Center and Memorial Radiology Associates, P.A. was filed under cause number 89-29940 in the 165th Judicial District Court of Harris County, Texas, and transferred to this Court by Transfer Order dated September 1, 1989.

"5. The suit against HCA Health Services of Texas, Inc., d/b/a HCA West Houston Medical Center and Memorial Radiology Associates, P.A. was filed without my knowledge, authorization or approval by the law firm of Hornbuckle & Montgomery. The law firm of Hornbuckle & Montgomery has never been retained by me for any purpose. Upon investigation, I discovered that they were retained to file the lawsuit against HCA by an attorney by the name of Donald E. Kilpatrick. Although I have never met him and I doubt my husband would have retained him for any purposes, Mr. Kilpatrick is said to have a contract or power of attorney executed by my husband. At no time since his injury on June 13, 1989, has my husband been competent to enter into an agreement to retain counsel.

"6. I requested my attorney, Alan Cohen, to ask Mr. Kilpatrick to return the contract and cease work on my husband's case. Mr. Kilpatrick refused, and to this day refuses. Further, Mr. Kilpatrick refuses to relinquish the contract and/or power of attorney, as well as any interest he may have under such document, even though the document my husband purportedly signed was obtained after my husband was adjudicated incompetent.

"7. I have told Mr. Kilpatrick that I did not retain him, nor did I wish to retain him or any law firm associated with him. In a telephone conversation, I told Mr.

Kilpatrick that I was considering several different attorneys and had already spoken to some. Mr. Kilpatrick's actions make it impossible for me to retain counsel to represent my husband's interests.

"8. My last direct contact with Mr. Kilpatrick was on the afternoon of July 25, 1989. Mr. Kilpatrick called me at home and requested I meet with him. As I had previously, I referred Mr. Kilpatrick to my attorney and suggested that he seek counsel before pursuing any action on Bill Camp's behalf. I informed Mr. Kilpatrick that he had no authorization to act on Bill's behalf. To my utter surprise, he informed me that a lawsuit had already been filed.

"9. Before hanging up, Mr. Kilpatrick tried to talk me into meeting with him and Hornbuckle & Montgomery. I replied that I did not even want to be in the same room with him.

"10. All of the incidents stated above have caused me a great deal of anxiety. My husband has received an injury which has rendered him incompetent. He will need constant care for a very long period of time. In order to protect Bill and our child's interests, it is urgent that I be permitted to retain counsel of my selection for my husband. In my efforts to seek counsel on behalf of Bill, each attorney consulted has told me to resolve the issue of Mr. Kilpatrick's "contract" before they will take the case. Each time I think about Mr. Kilpatrick's actions, I become very upset. I have enough to worry about in caring for Bill without having to deal with the problems created by Mr. Kilpatrick.

"11. The facts stated herein are true and correct."

/s/ Susie Varnell Camp
SUSIE VARNELL CAMP,
Guardian of the Person
and Estate of Bill
Adkins Camp, N.C.M.

SWORN TO AND SUBSCRIBED BEFORE ME by the said SUSIE VARNELL CAMP on this 30th day of October, 1989.

/s/ Judith Frost Treadaway
Notary Public in and for
The State of TEXAS

(Printed Name of Notary)

My Commission
Expires: ___

[SEAL]
JUDITH FROST TREADAWAY
NOTARY PUBLIC,
STATE OF TEXAS
MY COMMISSION EXPIRES
AUG. 18, 1992

APPENDIX 20

BAKER, BROWN, SHARMAN & PARKER
A Partnership Of Individuals And
Professional Corporations

Attorneys
Citicorp Center
1200 Smith, Suite 3600
Houston, Texas 77002

Robert S. MacIntyre, Jr.
Partner
Direct Dial Number
(713) 951-5615

Telephone (713) 654-8111
Telex 762063
Telecopier (713) 654-1871

October 6, 1989

BY MESSENGER

Mr. Donald E. Kilpatrick
8705 Katy Freeway, Suite 408
Houston, Texas 77024

Re: The Guardianship of Bill Adkins Camp, N.C.M.; Cause Number 229,862; In the Probate Court Number Two (2) of Harris County, Texas; Our File Number 001161/2

Dear Mr. Kilpatrick:

As you may know, this firm represents Mrs. Susie Varnell Camp, Guardian of the Person and Estate of Bill Adkins Camp.

In the course of her duties as Guardian for her husband, Mrs. Camp has learned that you are claiming you have a contractual relationship with Bill Camp with respect to his medical malpractice claims. Mrs. Camp has directed us to contact you and request the relinquishing of any "contract" you may have with Bill Adkins Camp,

as well as any contract that you may have with the law firm of Hornbuckle and Montgomery.

You may be aware that Mrs. Camp was appointed Guardian of the Person and Estate of Bill Adkins Camp on June 20, 1989. You also must be aware that Mrs. Camp never retained you, nor the law firm of Hornbuckle & Montgomery. In fact, Mrs. Camp has consistently maintained that she did not want you or Hornbuckle & Montgomery to represent Bill Camp in this matter. It is Mrs. Camp's position that you do not have a valid contract with Bill Camp, that after Bill's injury he was not capable of entering into a contract with you or anybody. Accordingly, we would request that you relinquish whatever "contract" you may have so that Mrs. Camp can obtain counsel on her own to prosecute Bill Camp's medical malpractice case.

It is not Mrs. Camp's desire or intention to litigate this matter with you. Clearly it is not in Bill Camp's best interest to have you maintain he was competent. Mrs. Camp believes the credible medical evidence is that Bill has not been competent since his treatment at HCA West Houston Medical Center. Your maintaining that Bill was competent to execute your contract does nothing but weaken Bill's case. Please reconsider your position and return the "contract." If we do not receive the contract by close of business on Wednesday, October 11, 1989, we will take whatever action is appropriate.

I would appreciate it if you would give this matter your immediate attention. If you need any further information, or would like to discuss any aspect of this matter, please contact me.

Sincerely,

/s/ Robert S. MacIntyre, Jr.
Robert S. MacIntyre, Jr.

RSM/dps/jft
10890091.057

cc: Mrs. Susie Varnell Camp
6806 Menlo
Houston, Texas 77083

APPENDIX 21

DONALD E. KILPATRICK
Attorney At Law
Hedwig Office Park
8705 Katy Freeway
Suite 408
Houston, Texas 77024
Telephone 932-7017

October 10, 1989

BY MESSENGER

Mr. Robert S. MacIntyre, Jr.
Partner
Baker, Brown, Sharman & Parker
A Partnership of Individuals and
Professional Corporations Attorneys
Citicorp Center
1200 Smith, Suite 3600
Houston, Texas 77002

Re: Power of Attorney and Assignment of Interest – Bill Adkins Camp to Donald E. Kilpatrick

Dear Mr. MacIntyre:

As you know Susie Varnell Camp's reliance that I do not have a valid contract is misplaced.

Facts, as they developed on my July 19, 1989 visit with Bill, are clear and convincing that Bill was capable of entering into a valid contract.

In fact, Bill was glad to see me. He knew who I was and stated my full name. While he was being fed, in a considerate act moved the T.V. so that it would be within my view.

Bill further expressed concerns that his wife had not been to visit him.

One of the first things Bill told me was he "would not be here if somebody had not messed up."

Bill was informed lawyers were in possession of information – evidence of acts and omissions of the health care providers causing Bill to sustain injury to his body and motor responses.

It was suggested that Power of Attorney be signed employing me to represent Bill in this case. Bill signed the Power of Attorney.

Bill's Mother came in with a case runner, J. Dale Dodd, who when told I had Bill's authority on the case said he was negotiating with six lawyers.

Likewise, Allen Cohn, Bill's two-month law associate, stated he was negotiating with at least six lawyers on Bill's case. Bill, similarly expressed concerns that Cohn was employed to handle some matters "up East only."

Moreover, conversations with your client, Susie Varnell Camp, told me she was talking to six lawyers about Bill's case.

This and knowledge of disputes between Bill's family members, lent credibility to my mind for Bill's expressions of concern over his family's absence in circumstances surrounding his custodial care and confinement.

Likewise, I have been occasioned damages from tortious interference of my and Bill's contract by family members and associates, whose involvement is not motivated by Bill's well-being but on the facts by their attempts at self dealing a piece of Bill's case.

Bill was alone and concerned. Needing attention and direction.

In me, Bill felt secure that he would receive that attention and direction. Leaving the conclusion that no one was there until I surfaced to provide care, direction, and assistance. Not only as a duty, but as a policy.

Still, only my efforts on Bill's behalf have protected and advanced Bill's case to this date. The facts convince and indicate that no one is interested in Bill just Bill's case.

Regardless, my personal feelings for Bill are not going to be considered.

A great deal of attention has been brought to me through a family dispute that my feelings fit nowhere, but my contract does.

This causes me to note, and at this point, feel that my contract is slowing down recovery for Bill due to interference and self dealing of family and assocites [sic].

If there is anything I can do to get Bill the care and attention he needs and speed his recovery, my contract and claims of interference can be surrendered for $277,000.00.

Please advise by close of business Monday, October 16, 1989 or I will take whatever action is appropriate.

I would appreciate it if you would give this matter your immediate attention. If you need any further information, or would like to discuss any aspect of this matter, please contact me.

Sincerely,

/s/ Donald E. Kilpatrick
Donald E. Kilpatrick

DEK/rg
A,DON

cc: Hornbuckle and Montgomery
Attornies [sic] At Law
1301 McKinney, Suite 3650
Houston, Texas 77010

APPENDIX 22

Texas Penal Code

§ 38.12. Barratry

(a) A person commits an offense if, with intent to obtain an economic benefit for himself, he:

(1) institutes any suit or claim in which he knows he has no interest;

(2) institutes any suit or claim that he knows is false;

(3) solicits employment for himself or another to prosecute or defend a suit or to collect a claim; or

(4) procures another to solicit for him or another employment to prosecute or defend a suit or to collect a claim.

(b) Intent to obtain an economic benefit is presumed if the person accepts employment for a fee, accepts a fee, or accepts or agrees to accept money or any economic benefit.

(c) Except as provided by Subsection (d) of this section, an offense under Subsection (a) of this section is a Class A misdemeanor.

(d) An offense under Subsection (a)(3) or (a)(4) of this section is a felony of the third degree if it is shown on the trial of the offense that:

(1) the defendant has previously been convicted under Subsection (a)(3) or (a)(4) of this section; and

(2) the solicitation is performed in whole or in part:

(A) in a hospital, funeral establishment, or public or private cemetery or at the scene of an accident;

(B) by using a person who is an employee of:

(i) this state;

(ii) a political subdivision of this state, including a county, municipality, or special purpose district or authority; or

(iii) a hospital or funeral establishment; or

(C) by impersonating a clergyman, public employee, or emergency assistance worker or volunteer.

(e) Final conviction of felony barratry is a serious crime for all purposes and acts, specifically including the State Bar Rules.

Amended by Acts 1989, 71st Leg., ch. 866, § 2, **eff. Sept. 1, 1989.**

Historical and Statutory Notes

* * *

Section 5(a) of the 1989 amendatory act provides:

"Section 2 of this Act relating to the offense of barratry applies only to offenses committed on or after the effective date of the Act. An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and that law is continued in effect for that purpose. For purposes of this subsection, an offense is committed before the

effective date of this Act if any element of the offense occurs before that date."

APPENDIX 23

Barratry Statute in effect at time of alleged misconduct.

Texas Penal Code

§ 38.12. Barratry

(a) A person commits an offense if, with intent to obtain a benefit for himself or to harm another he:

(1) institutes any suit or claim in which he knows he has no interest;

(2) institutes any suit or claim that he knows is false;

(3) solicits employment for himself or another to prosecute or defend a suit or to collect a claim; or

(4) procures another to solicit for him employment to prosecute or defend a suit or to collect a claim.

(b) An offense under this section is a Class A misdemeanor.

Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974.

PRACTICE COMMENTARY – 1973

By Seth S. Searcy III and James R. Patterson of the Austin Bar

This section restates in simpler terms the offense of barratry previously found in Penal Code art. 430. Barratry is defined to prohibit conduct that tends to foment litigation, for purposes other than the pursuit of justice, in situations where litigation might not otherwise arise. Litigation so fomented imposes a burden on the judicial

institutions and allows them to be employed as instruments of oppression or private aggrandizement rather than for the orderly resolution of bona fide disputes. Furthermore, a lawsuit instituted for the purposes proscribed in this section unjustifiably vexes those forced to defend the suit.

Barratry by an attorney is punishable by disbarment, R.C.S. art. 313. The tort remedy for malicious prosecution is also available for a suit filed maliciously and without probable cause. This section provides a criminal sanction to supplement these remedies. The authorized punishment is increased from the $500 and/or 3 months maximum of the prior law to a Class A misdemeanor.

APPENDIX 24

[p. 316] MR. BROWN: No, I'm at a loss is right. I have this request to have an instruction as to a despair rule which does make a distinction between lawyers and non-lawyers and I can't formulate at the moment.

THE COURT: Too bad. Now is the time we have to ask you to have all those instructions.

MR. BROWN: Well, I think I do have it. I think it was in the original.

I believe, Your Honor, it's included in one of the jury questions which you have denied.

THE COURT: Thank you.

MR. LANDIN: May I proceed, Your Honor?

THE COURT: Yes, sir.

MR. LANDIN: There is one matter before approaching the charge. Petitioner would request a trial amendment to the disciplinary petition on file herein in connection with testimony that was presented without [p. 317] objection. And in this respect, the amendment is as to Paragraph III, the second complete paragraph therein. Petitioner would request that the amended petition be allowed to – the petition be allowed to read in addition to what is presently in the petition that respondent solicited employment for himself with intent to obtain non-economic benefit for himself and the employment was to prosecute a suit or collect a claim.

MR. BROWN: Your Honor, true that's not in their petition and I wasn't prepared to defend that particular portion and I don't think we have any real, real

tetimony to that effect. What we have if I understand the testimony is that we have not tendered justice by creating excessive costs. That's what we have been talking about. We paid Nancy Lipp $1,000 costs. It didn't cost the estate anything. We have not interfered with the administration of [p. 318] justice.

THE COURT: Didn't cost the estate anything?

MR. BROWN: No, we didn't.

THE COURT: No, but guardian ad litem?

MR. BROWN: I don't think that's a proper one, Your Honor, and I object to it. That's not being something tried by implied consent.

MR. LANDIN: Your Honor, the testimony is before the jury and it was tried without objection – it was admitted without objection.

THE COURT: The request for trial amendment is granted.

MR. LANDIN: Thank you, Your Honor. I'll prepare the written amendment.

THE COURT: Yes, please, so you will have a record here.

MR. LANDIN: In connection therewith, Your Honor, petitioner would also request, this is petitioner's requested jury question – [p. 319] let me ask you, Your Honor, there are questions before the court. Do you want me to request all of those?

THE COURT: Yes. We can just do it – just hand it to be informal, just hand it to me. I want to preserve his

record, give him a chance to preserve his record. You have additional issues that you have shown me before?

MR. LANDIN: I have an additional issue which has not been shown to counsel previously.

THE COURT: Let's put the charge together as you think it ought to be and hand it to counsel and then hand it to me.

MR. LANDIN: Thank you, Your Honor.

MR. BROWN: Your Honor, was I understanding we have completed our charge conference and we are going on to other matters –

MR. LANDIN: No, Your Honor.

MR. BROWN: – amended– [p. 320] amended –

MR. LANDIN: No, Your Honor. I said –

MR. BROWN: – petition?

THE COURT: Well, I don't have a copy of the charge in front of me –

MR. BROWN: I don't either, Your Honor.

THE COURT: – so I can't cut him off.

MR. BROWN: And My recollection was we were instructed to have our charge at the beginning of trial.

THE COURT: Well, I understand but if you'll notice the law permits you to do this after the evidence is closed. What I tried to do and that's what I tried to do and I am the author of that portion of the Dallas Civil

Court Rules, you'd be surprised how much more efficient the docket moves with that rule of having the charge as well as your issues of the Rules of Civil Procedure.

MR. BROWN: Oh, I like that

[p. 321] THE COURT: And it also makes lawyers talk and settling a lot more cases.

MR. BROWN: I like that concept, but I don't like the concept of changing the rules after we've played the game. I don't like that concept.

THE COURT: No, I just asked you for a proposed charge. I'm not changing the rules.

MR. BROWN: I understand that.

MR. LANDIN: In connection with that, Your Honor, if I may respond?

THE COURT: I can't change the Rules of Civil Procedure.

MR. BROWN: I agree with that, Your Honor. What I'm saying is that I feel at a tremendous disadvantage by having trial amendments which may be, which are common I suppose, but I don't think in this case –

THE COURT: They are not common with this.

MR. BROWN: The Court has ruled. And then we are faced with additional [p. 322] charges I'm not ready to do anything about. It's basically not fair.

THE COURT: Hand it to him and let him look at it and give me a copy while he's looking at it.

MR. BROWN: Is this –

THE COURT: That's what he's proposing now is the charge, I assume.

MR. LANDIN: Yes, Your Honor.

MR. BROWN: Is it different from the original one?

MR. LANDIN: It is different only to the respect of one additional question which was not previously admitted and is supported by the trial amended which was just granted by the Court.

THE COURT: Do you have some more copies of those?

MR. LANDIN: Your Honor, let me see if I have.

MR. BROWN: Your Honor, this is – I must ask the Court to reconsider. Well, no, here, we are on the jury question. The jury question that [p. 323] they've furnished me – the Court hasn't seen yet – I have some serious objections to it as soon as the Court gets it.

(Discussion held off the record, brief recess has.)

(Jury still out.)

THE COURT: Counsel for the State Bar of Texas, you have a copy of the proposed charge of the Court in your hand?

MR. LANDIN: Yes, Your Honor.

THE COURT: What says the State Bar?

MR. LANDIN: Your Honor, we would request submission of the charge that has just been handed to the Court as the charge of the Court to this jury. It includes

definitions and instructions and three jury questions which are before the Court.

THE COURT: You have no objection?

[p. 324] MR. LANDIN: And I tender to counsel for opposing counsel.

THE COURT: You have no objection to the charge?

MR. LANDIN: I have no objection to the charge.

THE COURT: Counsel for the respondent, Mr. Brown –

MR. BROWN: Yes, Your Honor.

THE COURT: – the Court has handed you a copy of the proposed charge of the Court. What says the respondent?

MR. BROWN: My first observation is as to the jury question just tendered to the Court –

THE COURT: Yes, sir.

MR. BROWN: – and I suppose pursuant to the trial amendment. It inquires as to whether or not Mr. Kilpatrick with the intent to obtain economic benefit for himself solicit employment for himself to prosecute a suit or collect a claim. That act, fact or circumstance in a [p. 325] manner constitutes a violation of any code of ethics or disciplinary rule of conduct. It is not dishonorable to solicit employment to obtain economic benefit for yourself.

MR. LANDIN: May I respond?

MR. BROWN: Therefore, there is no reason to submit such an issue. And that is no –

THE COURT: I'm referring to their proposed jury question? You want to read it so that the two of you have a record to know what you are talking about?

MR. BROWN: Yes, Your Honor. The jury question which reads, not the instruction but the question: Did Donald E. Kilpatrick with intent to obtain become benefit for himself solicit employment for himself to prosecute a suit or to collect a claim. Now, that's preceded with an instruction that in connection with this question you are instructed that intent to obtain economic benefit is [p. 326] presumed if a person accepts employment for a fee, accepts a fee or accepts money or any economic benefit, not – I object to the issue, Your Honor. It's not relevant to this case not supported by any pleadings in this case and under no circumstance could constitute a violation of any code of professional responsibility.

MR. LANDIN: Your Honor, in light of the trial amendment that's been granted by this Court, there are pleadings to support the submission. The submission is based upon the definition – the instruction is based upon definitions contained in Section 3812 of the Texas Penal Code which is the barratry statute which defines the offense of barratry as solicitation of employment for purposes of obtaining economic benefit, that employment being for the prosecution of a suit or collection of a claim. As far as to whether or not it's a violation of disciplinary rule as some sort of [p. 327] misconduct, Section 7, Article 12 the State Bar rules promulgated by the Supreme Court

define professional misconduct to include barratry and for which offense discipline can be imposed.

MR. BROWN: If it please the Court in rebuttal. I'm not qualified nor ready to try a barratry case. I have with my 30 plus years of practice tried, I think, one criminal case and that was probably 30 years ago. I have no readiness nor ability to try a criminal case of barratry.

THE COURT: This is not a criminal case.

MR. BROWN: This is not a Criminal Court and this is not a criminal case. So if the State Bar wants to try an issue of barratry, let them go in Criminal Court and try it but not here and let Mr. Kilpatrick get someone qualified to try a barratry case. I'm not qualified to do this.

MR. LANDIN: Your Honor, this [p. 328] Court is competent and has jurisdiction to try allegations of professional misconduct by which of definition contain that, refer to Article 10, Section 7. The specific subsection is Section 5 which says discipline may be imposed for professional misconduct which includes engaging in conduct which constitutes barratries defined by the law of this State. The instructions and requests about petition defines barratry pursuant to the law of this State and I say Section 3812 of the Penal Code.

THE COURT: And evidence was received with that objection?

MR. LANDIN: That's correct, Your Honor.

MR. BROWN: Your Honor, I am surprised about this turn of events. I'm not prepared, have not been prepared to handle this particular aspect of a case. And barratry is basically referred to Mr. Kilpatrick to insert it

at this late stage after [p. 329] both parties have rested. I'm surprised –

THE COURT: The word barratry was even mentioned to the jury.

MR. LANDIN: It has been, Your Honor.

THE COURT: Pardon me. Was it? Yes, in conjunction with the statute, sir. Mr. Landin, you did it.

MR. LANDIN: Pardon me, I didn't hear you.

THE COURT: You did it. The word barratry was mentioned to the jury?

MR. LANDIN: Yes, it was, through Mr. Hagans. Yes, Your Honor.

THE COURT: With no objection?

MR. BROWN: I can only give the Court –

THE COURT: The fact is I clinched. I hope nobody noticed it, but I was wondering where we were going.

MR. BROWN: I can only give the Court the benefit of my opinion, Your Honor. My opinion is that this issue [p. 330] has no bearing in this case whatsoever, should not be given. It is basically an unfair jury question.

THE COURT: Objection is overruled.

You have any further objections to the charge?

MR. BROWN: Yes, Your Honor. I would request in connection with the charge, I plead surprise and ask

the Court for a continuance to allow me to prepare for rebuttal to the trial amendment.

THE COURT: Do you wish to respond?

MR. LANDIN: Your Honor, both sides have closed and rested as is tried by consent. The case is over. There's not need for another trial. We simply will argue the case to the jury.

THE COURT: Request is denied. Motion for continuance denied.

Does that conclude the objections to the charge?

[p. 331] MR. LANDIN: Petitioner has no further objections to the charge.

THE COURT: Petitioner has none.

MR. LANDIN: None.

THE COURT: Does the respondent?

MR. BROWN: Respondent can't think of any others at the moment, Your Honor.

THE COURT: Now, now is the time.

MR. BROWN: Yeah, now is the time, Your Honor, but.

THE COURT: All right, I'll ask what order do you want these questions, do you request, sir?

MR. LANDIN: Your Honor, the order that I had them in my own copy was the first question would be, did Donald E. Kilpatrick initiate contact with Bill Camp as a prospective client?

THE COURT: All right, that's the copy you gave me and the order was that was last.

MR. LANDIN: That was last.

THE COURT: I thought it would be more logical to be No. 1.

[p. 332] MR. LANDIN: We would request that that be inserted as No. 1, Your Honor.

THE COURT: All right, and your second one is the long question?

MR. LANDIN: Yes, Your Honor.

THE COURT: And the third question would be?

MR. LANDIN: In connection with the barratry instruction. In connection with this question instructed that incident to obtain economic benefit is presumed –

THE COURT: That's the third question?

MR. LANDIN: That's the third question.

THE COURT: That's the logical way.

Does counsel for the respondent have any further objections to the charge?

MR. BROWN: Your Honor, I can't think of a way to argue my objections –

THE COURT: All right.

* * *

APPENDIX 25

* * *

Jacksonville, 405 U.S. 156, 170 (1972); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Some commentators have suggested that vague disciplinary rules have been used as a tool for singling out unorthodox and unpopular attorneys for sanction, comment, *Controlling Lawyers By Bar Associations and Courts*, 5 Harv. Civ. Rights – Civ. Lib. L. Rev. 301, 312-314 (1970).

XIV.

Moreover, disbarment in Texas is a severe penalty and exacts a potentially severe deprivation of liberty and property interests that are fully protected by due process clause. This court's judgment of disbarrment [sic] brands Kilpatrick as an unethical attorney who has violated his solemn oath of office and committed a "willful breach" of the Code of Professional Responsibility, and it will be published in statewide professional journals and official reports to the Texas Supreme Court.

In light of Texas Bar's vague rules, and express ban against solicitation of non-lawyers and ignoring Donald E. Kilpatrick's state of mind in regard to medical doctor's opinion of client and failure to specify precisely what Donald E. Kilpatrick did or did not do to violate rules, constitutes a potential trap for an unwary attorney acting in good faith in forming judgment. Not only works significant due process deprivation, but also imposes an intolerable chill upon the exercise of First Amendment rights.

Donald E. Kilpatrick did not receive a fair and impartial trial, nor did State Bar of Texas give fair notice of charges against him even before untimely filed trial amendment. "A person's right to reasonable notice of charge against him, and an opportunity to be heard in his defense – a right to his day in Court – are basic in our system of jurisprudence." *In Re: Oliver*, 333 U.S. 257, 273 (1948). Under the due process clause, "reasonable notice" must include disclosure of "the specific issues the party must meet", *In Re: Gault*, 387 U.S. 1, 33-34 (1967), and appraisal of "the factual material on which the agency relies for decision so that he may rebut it". *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 at n. 4 (1974). The State Bar of Texas never included disclosure of specific issues Defendant was to meet, never did State Bar of Texas give plain notice of alleged specific violations of disciplinary rules and ethical consideration. No recommendation was made prior to filing suit and no attempt was ever made by State to give notice as to why rules expressly applied to NON-lawyers and were selectively applied to Defendant, nor did State Bar give plain notice as to why medical opinion of Dr. Morris did not bring Defendant's acts in harmony with rules, cases and canons claiming duty of brother lawyer to assist brother lawyer. The due process guarantees apply fully to attorney disciplinary proceedings because obviously "lawyers also enjoy first class citizenship." *Spevack v. Klein*, 395 U.S. 511, 516 (1967). Where there is an "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges", so that the attorney is not given a meaningful

opportunity to present evidence in his defense, the proceedings violate due process. *In Re: Ruffalo,* 390 U.S. at 552. The State Bar's change of theories by requesting trial amendment after all parties had rested and at close of Charge Conference afforded Donald E. Kilpatrick no opportunity to present evidence opposing Board's surprise exercise of judicial notice. Defendant had no opportunity to show evidence untrue. To hold that this sort of procedure constituted a meaningful "chance to be heard in a trial of the issues", *Cole v. Arkansas,* 333 U.S. 196, 201 (1948), is to make a mockery of the due process of law that is guaranteed every citizen accused of wrongdoing. *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626 (1985).

This concludes *Defendant's Second Supplemental Petition to Motion For New Trial and Judgment Non Obstante Veredicto.*

Respectfully submitted,

DONALD E. KILPATRICK – Pro Se

8705 Katy Freeway, Suite 408
Houston, Texas 77024
Telephone: (713) 932-7017
Facsimile: (713) 468-1624

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was served on all parties of record on this the ___ day of April, 1992.

DONALD E. KILPATRICK – Pro Se

APPENDIX 26

Offer of Pro Bono

[p. 92] MR. MONTGOMERY: One last question.

Q (By Mr. Montgomery) My question to you is: Has it ever been indicated to you that the lawfirm of Hornbuckle and Montgomery would handle your husband's case on a pro bono basis?

A Yes.

* * *

APPENDIX 27

TEXAS LAWYER • MARCH 28, 1994

Paid Advertisement

ADVERTISING RULES: UNCONSTITUTIONAL

Mr. Morrison, if a member of (the Supreme) Court believes that these proposed advertising rules are unconstitutional, are you suggesting that the Court should nevertheless approve a referendum?*

– **Supreme Court Chief Justice Tom Phillips**
[Photo omitted in printing]

Yes. Yes, I am.*

– **State Bar of Texas President Lonny Morrison**
[Photo omitted in printing]

The United States Supreme Court has repeatedly struck down advertising restrictions like these. U.S. District Judge David Hittner recently found portions of Texas' new barratry statute unconstitutional. Similar regulations advanced in other states have resulted in expensive, time-consuming litigation over constitutionality.

After their first attempt at restricting lawyer advertising failed, the leadership of the State Bar went back to the Supreme Court for permission to try again. After oral arguments from Lonny Morrison and an attorney for Texans Against Censorship, the Court certified the referendum only by the slimmest of margins – over the dissent of Chief Justice Tom Phillips and other members. Such dissent on State Bar referendums is virtually unprecedented.

*Due to mechanical malfunction in Supreme Court recording equipment, a complete record of the hearing is unavailable. These statements are based on witness reconstruction.

The Bar leadership has changed the
voting rules. Whether or not you vote on
other ballot issues
DON'T VOTE ON A&B
Texans Against Censorship
Lawyers for Freedom of Speech

"Perhaps a greater problem is the disingenuous approach by the Bar in putting this Court in the position of rubber-stamping proposals the Bar leadership concedes may have constitutional problems."

– Justice Bob Gammage

APPENDIX 28

* * *

not acting "under color of state law" (pp. 279).

Again, the material published by the State Bar of Texas at Part B, *Appointment of Temporary Guardian*, Section 4.11, *Appointment and Qualification of Temporary Guardian* state:

A temporary guardian has only the powers specifically set forth in the order of the court appointing him. *Tex. Prob. Code Ann.* §131(b) (Vernon's 1980). As soon as the temporary guardian takes and files an oath and the bond is filed and approved, the clerk of the court will also issue letters of temporary guardianship, *which also specify the powers of a temporary guardian* (emphasis ours). The order of the preference among proposed guardians designated in *Tex. Prob. Code Ann.* §109 and disqualifications as established in *Tex. Prob. Code Ann.* §110 apply to temporary guardianships. *Blackburn v. Gantt*, 561 S.W.2d 269 (Tex. Civ. App. – Houston [1st Dist.] 1978, no writ); see *Tex. Prob. Code Ann.* §133(b) (Vernon's 1980) (temporary guardianships governed by all applicable provisions of the probate code.); Section 4.12 *Citation and Notice;* citation is issued and posed immediately after appointment of temporary guardian, giving all interested persons an opportunity to contest the appointment if they so desire. *Tex. Prob. Code Ann.* §131(d) (Vernon's 1980). In addition, personal service of citation on interested persons may be necessary. If no contest of the appointment is made within the time specified in the citation, the temporary guardianship may continue for as long as the court

deems it to be in the interest of the ward or the ward's estate, or until it is made permanent.

Likewise, some case authority existed in support of the State Bar of Texas published material and the position advocated by Donald E. Kilpatrick that led to or seemed to support a good faith judgment on the part of Donald E. Kilpatrick that the orders of temporary guardianship signed by judge. Pat Gregory did not confer specifically to temporary guardian or any other person, powers or authority over Bill Camp's cause of action for injuries sustained by alleged negligence, acts or omissions of health care providers. i.e. *the powers of a temporary guardianship must be stated in the order of appointment, and the temporary guardian may not perform any acts not specifically authorized by the court* (emphasis ours). *Lambright v. Quick,* 214 S.W.2d 697 (Tex. Civ. App. – Galveston 1948, ref'd nre) at note [1], states at pp. 699, "it is established law in this state that a temporary administrator has only such limited powers as are conferred upon him by the order of the court appointing him, and that the mere allegation that appellee was a temporary administrator of the lien estate does not state any authority on his part to approve appellant's claim for services rendered. . . . ".

Similarly, *Tolivar v. Lombardo,* 88 S.W.2d 733 (Tex. Civ. App. – Beaumont, no writ), at note [1, 2], pp. 733, "temporary administrator has only such powers and duties as are conferred upon him by order of appointment, and authority to approve or reject a claim or defend suit thereon are special powers to be exercised only on order of the probate court." The court goes on to say, at pp. 733, "a temporary administrator has only such powers and

duties that are conferred upon him by order of appointment."

In *Barret v. Parchman*, 675 S.W.2d 289 (Tex. Civ. App. – Dallas [5th Dist.] 1984, no writ), at pp. 292 and note [5, 6] states "any action taken by a temporary administratrix not expressly authorized is void." *Tex. Prob. Code Ann.* §133 (Vernon's 1980). "Therefore, actions by an administrator not authorized by delineated powers or legal duty to the estate are not compensable." Citing *Drake v. Musecrie and Cohen*, 532 S.W.2d 369, 374-375 (Tex. Civ. App. – Dallas 1975, ref'd nre). *Webster's New Collegiate Dictionary* (1983) defines delineated as 1: to indicate or represent by drawn or painted lines, b: to mark the outline of; 2: to describe, portray or set forth with accuracy or in detail.

The authority of a temporary administrator is to act as a conservator, not a distributor of the estate. *Baylor University v. Ogilvie*, 222 S.W.2d 165, 167-168 (Tex. Civ. App. – San Antonio, 1949 no writ). Thus, a temporary administrator cannot intervene in a will contest without express authorization. *Campbell v. Campbell*, 215 S.W. 134, 142 (Tex. Civ. App. – Dallas 1919, writ ref'd). "Temporary guardian has only that power specifically granted him by the Court." *Young Men's Christian Ass'n. of Metropolitan Ft. Worth*, 552 S.W.2d 497 (Tex. Civ. App. – Fort Worth, 1977, ref n.r.e.).

There existed at all material times legislative enactments and judicial opinions applicable to these facts in this instant case. Donald E. Kilpatrick's conduct at all times material in relation with Bill Camp, brother lawyer at the Bar, was supported by *State Bar Disciplinary Rules* and *Ethical Considerations* (1989), the law or is supportable

by a good faith argument for an extension, modification, or reversal of the law. And though it is possible there may have existed areas of conflicting authority, there exists law the temporary guardian had not authority to act unless specifically granted in court's temporary orders. There was no such specific grant in the temporary orders signed by Judge Pat Gregory regarding Bill Camp on 20 June 1989.

Likewise, the case of *Rosemont Enterprises, Inc. v. Lummis*, 596 S.W.2d 916 (Tex. App. – Houston [14th Dist.] 1980, no writ) is significant because it is a case out of Judge Pat Gregory's Probate Court No. 2 where appellant urged powers of temporary administrator included only those powers specifically expressed in the order of the court appointing them, and as may be expressed in subsequent orders of the court, citing *Tex. Prob. Code Ann.* §133 (Vernon's 1956). Identical to this Defendant's argument, but DISTINGUISHABLE by the language of the Houston [14th Dist.] appellate court, who went on to say that the argument in the *Rosemont* case overlooked the fact that in the *Rosemont* case Judge Gregory's order of August 18, 1976 granted the temporary co-administrator "the same powers, authorities, and duties conferred on *permanent* administrators (emphasis ours) under the Texas Probate Code . . . ", thus distinguishable from the instant case and gave the author of these lines a good faith belief in the judgment that if the temporary guardianship powers of Susie Varnell Camp were to be extended to include something not specifically delineated in the order of temporary guardianship, then Judge Gregory would have given Susie Varnell Camp a grant of the same powers, duties

and authorities conferred on a temporary co-administrator as permanent as in the *Rosemont* case. By so not doing, Judge Gregory obviously did nor intend to covey any powers to Susie Varnell Camp other than were specifically set out in his order, limiting the powers of temporary guardian. On inspection of the *order* in this case granting temporary guardianship by Judge Gregory, a copy of which is attached and marked *Exhibit* 22, together with the *Order Affirming Temporary Guardianship And For Payment Of Attorney Ad Litem,* which is attached and marked *Exhibit* 23, it is clear that Judge Gregory did not confer on the temporary guardian powers, authorities, and duties the same as conferred under a permanent administration under the Texas Probate Code. Indeed, Judge Gregory, in his *Order Affirming Temporary Guardianship And For Payment Of Attorney Ad Litem* (*Exhibit* 23), decreed the appointment is pursuant to § 131 of the *Texas Probate Code.*

The Orders Appointing Temporary Guardian, attached marked Exhibit 22, 23, was prepared by Alan Cohen (Exhibit 33, P. 5, L. 15-18, P. 6, L. 10-13), a licensed attorney in the State of Texas, enumerating powers of temporary guardian to appoint Alan Cohen to operate Law Office of Bill Adkins Camp.

Likewise, Mr. Alan Cohen placed language in the order seeking to limit liability to client or ward in controvention of *Texas Code of Professional Responsibility* DR6-102 and *Canon 6 and State Bar of Texas Ethical Consideration* 6-6, which basically state "a lawyer shall not attempt in advance to exonerate himself from or limit his liability to his client for his malpractice." Though the court appears to have struck the limiting language and particularly

spelled out and set out Mr. Cohen's limited duties (attached *Exhibit* 24).

The absence of language in the orders of temporary guardianship specifically delineating powers of temporary guardian over recovery for personal injuries for Bill Camp's cause of action for injuries sustained to his person by the alleged negligence, acts or omissions of health care providers together with case law, legislative enactments specifically decreeing personal injury to one spouse during marriage remains his or her separate property. It was clear or at least conclusive in Donald E. Kilpatrick's good faith judgment that Bill Camp's unliquidated personal injury action had not been made, at least on July 19, 1989, the subject of the order of temporary guardianship.

Jamail v. Thomas, 481 S.W.2d 485 (Tex. Civ. App. – Houston [1st

* * *

APPENDIX 29

[p. 266] REDIRECT EXAMINATION

QUESTIONS BY MR. LANDIN:

Mr. Hagans, are you familiar with the Texas barratry statute?

Generally, yes sir.

And what is your definition of barratry?

MR. BROWN: Objection to his definition, Your Honor. The definition is a matter for the Court.

THE COURT: Overruled.

[p. 267] Q Would it in your opinion if a lawyer was contacting a potential client for purposes of securing employment for himself, would it be more suspect if that contact took place in a hospital?

MR. BROWN: Your Honor, I have a further objection to that. This is not proper recross – I mean, redirect. I didn't open up that in cross-examination.

* * *

APPENDIX 30

Referral Fee

[p. 82] Q (By Mr. Kilpatrick) Were you aware that Alan Cohen was seeking a forwarding fee from all of the above lawyers that you named; that he was asking them to pay him money for delivering Bill's case to those lawyers? Are you aware of that?

A I am fully aware of the system of referral fees.

Q Yes, ma'am.

* * *

APPENDIX 31

EC 2-18. The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.

(Article XII, § 8 renumbered as Article X, § 9 February 29, 1984, effective March 1, 1984.)

APPENDIX 32

* * *

[p. 222] In July 19, 1989 and found that person to have been severely injured and motor movements really impaired, some obvious to you anyway impairment of his thinking abilities and still that person says to you, Mr. McIntyre, I need help as a lawyer, would you help me, would you say yes I'll help you?

A Certainly.

Q Assume that person had difficulty in speaking coherently but still makes some sense, would you still help him?

A Are we talking hypothetically now or are we talking about Mr. Camp?

Q We are talking about a hypothetical situation. You are an attorney.

A I would like to think that I would help someone in that circumstance. Yes, sir.

Q And would you let part of your duties as an attorney to help people? That's what you are an attorney for?

A It's part of my duty as a person, as a human being.

Q As a human being, isn't it?

A Yes, sir.

* * *

APPENDIX 33

* * *

make any suggestions as to employment."

Moreover, volunteer assistance has been promoted by the State Bar at least in words of longstanding and established by *State Bar of Texas, Comm. On Interpretation of the Code of Professional Responsibility*, 225 (1959), "a lawyer may properly volunteer free legal advice and assistance to the indigent and needy so long as it is not done with the improper motive of self advertisement."

Likewise, the *Texas Code of Professional Responsibility*, DR2-110 (1989), (2) unequivocally stated "in any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid forseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules."

Similarly, *State Bar of Texas Ethical Consideration* EC 1-1 in force on or about July 19, 1989, stated: "a basic tenet of professional responsibility of lawyers is that every person in our society should have ready access to independent professional service of a lawyer of integrity and competence, maintaining the integrity and improving the competence of the Bar to meet the highest standards is the ethical responsibility of every lawyer."

Likewise, *Canon 2 of the Texas Code of Professional Responsibility* (1989) supported, directed and affirmed Donald E. Kilpatrick's acts and deeds in language, "a

lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

Similarly, *State Bar of Texas Ethical Consideration* published and promulgated in 1989, supported Donald E. Kilpatrick's efforts in Bill's case, in EC 2-1, "the need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen, to recognize their legal problems, to facilitate processes of intelligent selection of lawyers, and to assist in making legal services fully available."

And, in *State Bar of Texas Ethical Consideration EC 2-26*, acceptance and retention of employment placed in Donald E. Kilpatrick's judgment a good faith, honest belief he should accept Bill Camp's tendered employment by its words here quoted, "A lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client; but in furtherance of the objective of the Bar to make legal services fully available, a lawyer should not lightly decline proferred employment. The fulfillment of this objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and to the Bar generally", and *State Bar of Texas Ethical Considerations EC 2-28*, "the personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify his rejection of tendered employment."

Further support for Donald E. Kilpatrick's action was found in the *State Bar of Texas, Comm. on Interpretation of the Code of Professional Responsibility*, Op. 193 (1959), which decrees: "the loyalty owed by the attorney to his client generally controls over any duties under other canons, in the event of conflict."

Moreover, Canon 5, *State Bar of Texas Ethical Considerations* in force in 1989 and styled "a lawyer should exercise independent professional judgment on behalf of a client." *State Bar of Texas Ethical Considerations EC 5-1*, "the professional judgment of a lawyer should be exercised, within the bounds of the law, *solely* (emphasis ours) for the benefit of his client, and free of compromising influences and loyalties. Neither his personal interest, the interest of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."

Likewise, Donald E. Kilpatrick, at all times material to this occurrence, operated under a good faith judgment that he was on the path of *State Bar of Texas Ethical Considerations EC 5-21, Desires of Third Persons*, "the obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be *alert* (emphasis ours) to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be

impaired thereby, the lawyer should take proper steps to withdraw from representation of his client."

The high duty labored under by Donald E. Kilpatrick was recognized by *State Bar of Texas Ethical Considerations*, Canon 7, "the lawyer should represent a client zealously within the bounds of the law." EC 7-1. "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously, within the boundaries of the law, which includes *disciplinary rules* and *enforceable professional regulations*. The professional responsibility of a lawyer derives from his membership in a profession which *HAS THE DUTY OF ASSISTING MEMBERS OF THE PUBLIC TO SECURE AND PROTECT AVAILABLE LEGAL RIGHTS AND BENEFITS. IN OUR GOVERNMENT OF LAWS AND NOT OF MEN, EACH MEMBER OF OUR SOCIETY IS ENTITLED TO HAVE HIS CONDUCT JUDGED AND REGULATED IN ACCORDANCE WITH THE LAW* (emphasis ours) to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue or defense."

Likewise, the disciplinary rules and enforceable professional regulations in 1989, which presumed enlightenment to Donald E. Kilpatrick, included *State Bar of Texas Ethical Considerations*, EC 7-2, "the bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions in changing public and judicial attitudes. Certainty of law ranges from well settled rules

through the areas of conflicting authority to areas without precedent."

Indeed, the 1989 *State Bar of Texas Ethical Considerations*, EC 7-4 states: "the advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion and to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if this position taken is supported by the law or is supportable by good faith argument for an extension, modification or reversal of the law. . . . ".

* * *

APPENDIX 34

POWER OF ATTORNEY

THE STATE OF TEXAS §
COUNTY OF HARRIS §

KNOW ALL MEN BY THESE PRESENTS:

That Bill A. Camp, whose address is 8802 Beau Mondi Drive Houston, Texas 77083-1427, have employed and appointed, and do hereby employ and appoint the undersigned attorney, duly licensed and practicing in the State of Texas, and the law firm of DONALD E. KILPATRICK, as my true and lawful counsel, to act for me and in my name in the name of my children, to take any appropriate legal action which is deemed necessary to prosecute and collect claims against

All Doctors Hospitals, radiologists, anesthesiologists and all health care providers for acts and omissions care and services causing personal disability for now and in the future. and to file any suit, conduct the same to a final decision, or compromise or negotiate any settlement; and I agree to make no settlement without the consent of said attorney. That I further convey the authority to DONALD E. KILPATRICK to use associate or other legal counsel should he deem it necessary to protect my interests herein.

IN CONSIDERATION of the services rendered and to be rendered by said attorney, I hereby assign and convey to said attorney the following present undivided interest in said claim or claims:

33 1/3% if settled before suit is filed; or
40% if suit is filed; or
50% if appeal is perfected.

The interests hereby assigned are on gross recovery, and all expenses of litigation not previously paid are to be deducted from my remaining share of the amount collected, before final distribution of the recovery.

EXECUTED this 19th day of July , 1989.

/s/ Illegible

ACCEPTED:

DONALD E. KILPATRICK

By: /s/ Donald E. Kilpatrick
8705 Katy Freeway, Suite 408
Houston, Texas 77024 932-7017

APPENDIX 35

* * *

guards and staffers brandishing night sticks against patients routinely taken advantage of, because many are unable to talk or be taken as credible because of brain injury or impaired motor responses, assaults inflicted on patients in rehabilitation institutes.

All tend to focus on need of patients exercise American concept and guarantee of right to counsel. As well as right and duty of counsel to assist those subject to abuses.

Likewise, *Tex. R. Civ. P.* 12 requires lawyers to have authority to represent clients and citizens. *Texas Rules of Professional Responsibility* likewise suggest all contracts of employment be in writing. At hearing before Judge Gregory on Motion of Don Kilpatrick to show authority, Susie Varnell Camp did not deny on questioning from Tony Montgomery that Hornbuckle and Montgomery, lawyers associated with Donald E. Kilpatrick and whose name appears as Bill Camp's attorneys in suit filed in District Court, offered to represent Bill free of charge for no attorneys fees (*Exhibit* 28, Grg. S.F. P. 86, L. 17-23, P. 92, L. 1-6). Further evidence that Don Kilpatrick pursuant to EC 2-18's "commendable and longstanding tradition that special consideration is given to the fixing of any fee rendered a brother lawyer or member of his immediate family."

Other factors tending to prove Donald E. Kilpatrick performing his duty and conduct within bounds of law and permissible are, to wit:

1. Request of Bill Camp for Donald E. Kilpatrick to represent him in his cause of action for injuries sustained as a result of alleged negligence of health care providers;

2. Order of Temporary Guardianship signed by Judge Pat Gregory not stating or specifically authorizing temporary guardian power over Bill Camp's unliquidated claim for personal injuries sustained by alleged negligence of health care providers, pursuant to law, statutes, cases, and Tex. P. Code. Ann. §131(a) and (b) (1989).

3. Cases, legal and judicial opinions holding "temporary guardian has only that power specifically granted him by the Court." *Young Men's Christian Ass'n. of Metropolitan Fort Worth*, 552 S.W.2d 497 (Tex. Civ. App. – Ft. Worth, 1977, ref. n.r.e.);

4. Opinion from Judge Pat Gregory's Probate Court No. 2 granting extra temporary powers in temporary administration by appointing co-administrators and conferring on one of co-administrator's same authority as permanent guardian. *Rosemont Enterprises v. Lummis*, 596 S.W.2d 916 (Tex. Civ. App. – Houston [14th Dist.] 1980, no writ);

5. Actions of Bill camp at the hospital;

6. Fact Bill and wife separated and living apart since February of 1989 (*Exhibit* 34, Grg. S.F. P. 70, L. 8, 9, 14);

7. Contest of Barbara Camp, Bill Camp's mother, to appointment of Susie Varnell Camp as temporary guardian (*Exhibit* 34, Grg. S.F. P. 79, L. 15-20);

8. Fact Bill's wife and temporary guardian had not been to visit him in hospital for week to 10 days;

9. Dodd, a non-lawyer, with history of referral of cases to other lawyers and law firms (*Exhibit* 26, Grg. S.F. P. 70, L. 16-17).

10. Attorney Alan Cohen – preparer and drafter of Order of Temporary Guardianship attempting to contract away own negligence in violation of express Texas Code of Professional Conduct (attached marked *Exhibit* 24);

11. Under statute, injured spouse has sole right to manage, control, and dispose of action to recover damages for personal injuries;

12. Corruption and potential abuses of health care providers and rehabilitation institutes (*Exhibit* 27) to patients, reasonable expectation of harm;

13. Dr. Morris, M.D.'s "opinion based upon reasonable medical probability, his training and experience and personal observation of Bill Camp. That Bill [sic], though physically impaired, is mentally competent to enter a contract to prosecute his personal injury claim and is fully capable of understanding and comprehending its ramifications." (*Exhibit* 22);

14. Supreme Court of Texas approval of holding insane or incompetent persons contract not void, but voidable; *Simpson v. Neely*, 301 S.W.2d 303 (Tex. Civ. App. – Waco, 1949 ref'd);

15. Legal right to legal services to a person of unsound mind as necessities. As approved and adopted by Supreme Court of Texas in *Ferguson v. Fitze,* 173 S.W. 500 (Tex. Civ. App. – Galveston, 1915, ref'd);

16. Advice of other counsel, Hornbuckle and Montgomery;

17. Offer of Hornbuckle and Montgomery, handling attorneys on Bill Camp's original petition filed in Harris County District Court for injuries sustained in medical malpractice that they would represent Bill Camp pro bono for nothing (*Exhibit* 35, Grg. S.F. P. 88, L. 18-23, P. 92, L. 1-6);

18. No evidence and there is none that Donald E. Kilpatrick would not assist Hornbuckle and Montgomery in their pro bono offer to represent Bill Camp for no fee. Letters to Susie Varnell Camp's probate lawyers, advocating Donald E. Kilpatrick's position in dispute with other lawyers. To prove fact there was no authority over Bill's cause of action granted per cases and materials on temporary guardianship.

In review and study of the 1989 *Texas Code of Professional Responsibility, State Bar of Texas Ethical Considerations* and comments on *Interpretation of the Code of Professional Responsibility,* there can be no conclusion other than promotion of assistance of counsel at each phase of American life for each individual citizen.

CONCLUSION

Donald E. Kilpatrick had every right under the laws of United States Constitution and the Constitution of the State of Texas to go to the Texas Institute of Research and Rehabilitation to see a brother lawyer stricken down by whatever reason. Particularly with evidence and proof – truth as to a proximate cause of the reason for Bill Camp's present existence and confinement behind the walls of the Texas Institute of Rehabilitation and Research. It would be, God forbid Donald E. Kilpatrick's strongest wish and desire under like circumstances if it were he confined and not Bill that a fellow brother or sister lawyer of the State Bar of Texas take the time, extend the consideration, do the duty to visit Donald E. Kilpatrick and share evidence and proof of a proximate cause of his confinement and

* * *

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* * *

[p. 301] place. That would be a simple thing?

A Well, that could be claimed,

Q I don't agree that that's –

THE COURT: No, that isn't what he asked you. Just answer his question.

THE WITNESS: Yes, sir. I'm trying to.

QUESTIONS BY MR. BROWN:

Q That was my next question, Mr. Edwards. Do you agree – do you agree that the prior existence of a temporary guardianship negates or destroys the validity of the power of attorney?

A Absolutely not.

Q Are you somewhat familiar with the probate matters also?

A Generally, yes. I don't consider myself an expert in probate matters. I do consider myself an expert on temporary guardianships.

Q All right, sir. And on temporary guardianships, are those limited as to duration?

A They should be.

Q Are they limited as to powers?

A Yes. And they definitely should be.

Q Are you familiar with the line of cases which [p. 302] hold in effect that the powers of a temporary guardian are only those powers bestowed upon the temporary guardian in the order?

A Yes. In the connection –

THE COURT: Your answer is yes? You've answered the question, sir. You don't have an absolute license to make a speech, sir.

THE WITNESS: I realize that, Judge.

THE COURT: All right, sir. Please contain yourself within the rule.

THE WITNESS: Yes, sir.

QUESTIONS BY MR. BROWN:

Q Mr. Edwards, you know – how do you know Don Kilpatrick or do you know Don Kilpatrick?

A Yes, I do.

Q How do you know Don?

A I've known him on a personal and professional basis for I would suspect at least the last 15 years.

Q And you've agreed to come down here and testify for – from the request of Mr. Kilpatrick?

A Yes.

[p. 303] Q Were you paid anything to do so?

A Nothing.

Q You expect to be paid anything for doing it?

A No.

Q You are doing it as a friendship and the member of the Bar?

A Yes.

Q Okay, you know Mr. Landin, don't you?

A I've known Craig for I imagine a good 10 years.

Q You consider him a friend also, do you not?

A I do.

* * *

APPENDIX 37

* * *

[p. 296] Q You use the term turf war. That sounds like a shorthand rendition of a bigger subject. What is the bigger subject?

A Okay, there has been an ongoing, if you will, turf war here in Harris County in my personal experience since I've been practicing here for 20 years between the District Courts as such and the Probate Courts as such. I have personal knowledge.

MR. LANDIN: Objection, Your Honor, as to relevancy.

THE COURT: Sustained.

QUESTIONS BY MR. BROWN:

Q Are you familiar with Section 5A of the Probate Court, 5 capital A of the Probate Court –

A Generally, yes.

Q – as to jurisdiction of the Probate Court?

A Yes.

Q And does the District Court generally have jurisdiction over personal injury cases here in Harris County?

A Yes.

Q And does the Probate Court in some instances [p. 297] have jurisdiction over personal injury cases?

A Yes. And in some instances co-jurisdiction, if you will.

Q And is that jurisdiction line, has it been and is it now clearly definable?

A In my judgment, no. The law in that regard has changed repeatedly over a number of years depending on who's writing the current laws or amending the current laws. And in some instances they just point blank conflict with each other.

Q Now, you said you reviewed a medical affidavit, and affidavit for a medical doctor?

A Yes.

Q And do you have that medical affidavit with you?

A Yes.

* * *

APPENDIX 38

* * *

[p. 211] Q So your answer could be boiled down to a yes, could it not?

A Pardon me for being too much of a lawyer, yes.

Q After you filed an application for temporary guardianship, though, those are only good for a certain length of time, what, 60 days?

A They have limited duration and then they have to be renewed or expanded into a permanent guardianship.

Q They have limited duration. They have limited powers too, don't they?

A Some people take that position. I don't. I don't. No, sir. I don't.

Q You ever hear that position taken by probate lawyers?

A Reasonable minds differ on that. I don't –

Q Are you saying, Mr. McIntyre, that in the area of probate law reasonable minds do differ as to whether or not temporary guardianships are limited in duration and limited in power?

A Reasonable minds differ on this case, Mr. Brown. You and I are both reasonable people and you and I both differ about your client's conduct.

Q I think that's the same as a yes, wasn't it?

A No, sir. It was not a yes.

* * *

APPENDIX 39

* * *

And, there are a host of cases in which conduct found against the attorney was certainly much more egregious than alleged here, but in which the court approved lesser sanctions. *See e.g., Musselwhite v. State Bar of Texas,* 786 S.W.2d 437, 439 (Tex.App. – Houston [14th Dist.] 1990, writ denied) (attorney, on probation for prior ethical misconduct, knowingly violated terms of probation by soliciting victims of the Piper Alpha tragedy in Scotland and accepted new employment in an Agent Orange case when prohibited from doing so – *three years' suspension*); *Hebison v. State,* 615 S.W.2d 866, 867 (Tex.Civ.App. – Houston [1st Dist.] 1981, no writ) (attorney lied to two separate clients, told them suit was filed when it was not, which resulted in a limitations bar on the claims, refused to return either the clients' money or their files until the grievance was filed – *three months' suspension*); *Howell v. State,* 559 S.W.2d 432, 433-34 (Tex.Civ.App. – Tyler 1977, writ ref'd n.r.e.) (attorney filed suit when attorney knew there was another case pending, which he did not tell the judge at contempt hearing, and he refused to answer a question when ordered to answer by the judge – *reprimand*); *Archer v. State,* 548 S.W.2d 71, 73 (Tex.Civ.App. – El Paso 1977, writ ref'd n.r.e.) (attorney deposited client funds in his own account for his own use and attempted to get client to sign a false affidavit – *two years' suspension*); *Galaindo v. State,* 535 S.W.2d 923, 925 (Tex.Civ.App. – Corpus Christi 1976, no writ) (attorney misapplied and commingled client's funds and lied under oath to the grievance committee – *one year's suspension*); *State v. Baker,*

539 S.W.2d 367, 369 (Tex.Civ.App. – Austin 1976, writ ref'd n.r.e.), *appeal after remand*, 559 S.W. 145 (Tex.Civ.App. – Austin 1977, writ ref'd n.r.e.) (attorney purchased property on behalf of client at sheriff's sale and used that property for himself and committed two other ethical violations – *three reprimands*); *State v. Ingram*, 511 S.W.2d 252, 252-53 (Tex. 1974) (attorney misappropriated client's funds and lied under oath to the grievance committee – *three years' suspension*); *State v. Pevehouse*, 483 S.W.2d 565, 565-66 (Tex.Civ.App. – Eastland 1972, writ ref'd n.r.e.) (attorney embezzled $2,500 of client's funds – *one years' suspension*).

There are no cases in this State, nor in any other State, in which the penalty of disbarment was ever approved under circumstances similar to those presented here.

The Court's per curiam opinion does not cite any case law to support its holding. Rather, the per curiam opinion says that a trial court must consider certain factors in determining the sanction for attorney misconduct. *See* Court's opinion, at 7, citing Tex. Disciplinary R. 3.10 (1992). Then, the per curiam opinion states that "in light of the facts and circumstances presented, we cannot say that the trial court abused its discretion, and we disagree with the court of appeals that the sanction of disbarment is disproportionate to Kilpatrick's misconduct."

What then are the standards by which we are to judge the excessiveness of punishment for professional misconduct? Or, are there standards?

The Court cannot rely upon case authority because there is no case authority to support disbarment here.

And, the Court cannot rely upon the "factors" of Rule 3.10 (although the Court attempts to do so) because there is nothing in the record to show that the trial judge ever considered such factors. Although an evidentiary hearing on sanctions is authorized, the trial court did not conduct one. The trial court did not issue an opinion, or fact findings, or conclusions of law.

And, the Court cannot rely on the record below. There is nothing in the record which lifts this case into the sphere of truly egregious conduct for which disbarment has been authorized in the past. There is nothing in the record to indicate that Don Kilpatrick's errors in judgment were the result of knowing bad faith or callous disregard for his profession. There is nothing in the record to indicate that Don Kilpatrick ever committed any other ethical violation in his 18 years of practice.

What then are the standards by which we are to judge the excessiveness of punishment for professional misconduct?

Two cases from this Court suggest that there should be standards. In 1974, this Court was presented with a case in which the lawyer had been found to have misappropriated funds and lied to a grievance committee. *See State v. Ingram*, 511 S.W.2d 252, 253 (Tex. 1974). In that case, the trial court had imposed a three year suspension. *Id.* On appeal, the State Bar agreed that a three year suspension was an abuse of discretion and that the lawyer's egregious conduct mandated disbarment. *Id.* This Court disagreed.

The Court stated that "[a] judgment of a trial court in a disciplinary proceeding may be so light, or so heavy, as

to constitute an abuse of discretion." *Id.* However, the Court found that the fact that the conduct was an "isolated instance" to be a mitigating circumstance to justify three years' suspension, rather than disbarment. *Id.*

Here too, Mr. Kilpatrick's misconduct was an "isolated instance." There is no evidence of a pattern of ethical misconduct which should disqualify Mr. Kilpatrick from the practice of law. *See also Smith v. State*, 490 S.W.2d 902, 911-12 (Tex.Civ.App. – Corpus Christi 1972, writ ref'd n.r.e.) (disbarment for giving false advice to a client to coerce client to hire attorney, refusal to relinquish client documents, and filing suit to collect a fee after the client had agreed to pay in installments would be "excessive" and an "abuse of discretion").

* * *

APPENDIX 40

* * *

[p. 78] A Susie Varnell Camp.

Q And Mrs. Camp, you are Bill Camp's wife?

A That's correct.

Q And you are the Temporary Guardian?

A And the Permanent Guardian.

Q And you were appointed Permanent Guardian on July – or June the –

When were you appointed Temporary Guardian?

A June 20, 1989.

Q And when were you appointed Permanent Guardian?

A September 1, 1989.

Q All right. So Don Kilpatrick's Power of Attorney was signed on the 19th of July, 1989; is that not correct?

A That is my understanding.

Q All right. And you weren't the Permanent Guardian yet, were you?

A No.

Q And isn't it true, at the time of the incidents giving rise to the acts or ommissions [sic] from which Bill Camp sustained his injuries, that you and Bill [p. 79] were not living together?

MS. LIPP: Objection, Your Honor. It's not relevant.

THE COURT: It's a Bill of Exceptions.

Q (By Mr. Kilpatrick) You and Bill were not living together as man and wife?

A correct.

Q And you were separated, in fact?

A Yes.

* * *

Q How long have you and Bill been separated?

A Since February.

Q And do you recall that there was a formal contest filed against your Application as Temporary Guardian? That is true, isn't it?

A Yes.

Q And who filed that contest?

A Barbara Camp.

Q What was her objection to your being Temporary Guardian?

A I am not totally sure as to what all her objections were.

Q Whatever you know – Can you tell us why she [p. 80] didn't want you to be Bill's Guardian?

A Essentially, because she wanted to be. She wanted to live in San Antonio.

Q Yes?

A She thought that because we were separated temporarily that she had rights to do that.

Q Okay. But you and her ultimately settled that contest, didn't you?

A Yes.

* * *

[p. 84] Q And did you know that Mr. Cohen – Did you make any inquiries about Mr. Cohen's expertise in the medical malpractice field?

A Mr. Cohen's medical expertise in the medical malpractice field is not an issue. He is not going to be the attorney of record to represent Bill.

Q How long had he been a licensed attorney in the State of Texas when you first sought these referral fees?

A I believe he was licensed during this previous Spring, at some point.

Q Which would be like May or June?

A Uh-huh.

Q That's when he got his license? 1989?

A I would assume. I first met him in the middle of

* * *

Supreme Court, U.S.
FILED
JUN 2 1994
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No. 93-1745

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DONALD E. KILPATRICK
PETITIONER

V.

THE STATE BAR OF TEXAS
RESPONDENT

On Writ of Certiorari
To The
Supreme Court of Texas

BRIEF OF RESPONDENT

Respectfully submitted,

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STATEMENT OF THE CASE

On or about June 13, 1989, Bill Camp, an attorney in Houston, Texas, suffered a severe brain injury during a medical procedure which was being performed on an outpatient basis. Bill Camp's wife, Susie, was appointed to serve as Temporary Guardian for Bill on June 20, 1989, and Permanent Guardian on September 1, 1989. (Pet. Ex. 7; S.F. 126).

On July 19, 1989, while Mr. Camp was still hospitalized, Donald E. Kilpatrick ("Kilpatrick") went to visit him at the Texas Institute for Research and Rehabilitation (TIRR) and proceeded to obtain a signature, allegedly Bill Camp's, on a Power of Attorney form which authorized Kilpatrick to prosecute a medical

malpractice claim on behalf of Bill Camp. (Pet. Ex. 1; S.F. 273-274). Kilpatrick initiated this contact. His visit was not requested nor solicited by Bill Camp or any family member on behalf of Bill Camp. (S.F. 26; 274).

At the time Kilpatrick solicited Bill Camp, both a guardian and an attorney ad litem had been appointed to represent Camp as a result of a finding that he was incompetent. (Pet. Ex. 7; S.F. 156; 275). Kilpatrick knew or reasonably should have known that Bill Camp was not capable of exercising reasonable judgment in employing a lawyer. In making this contact, Kilpatrick solicited employment for himself to prosecute a suit or collect a claim,

intending to obtain an economic benefit for himself.

Before Kilpatrick left the hospital, Bill Camp's mother, Barbara Camp, and Joseph Dale Dodd, a family friend, met Kilpatrick. (S.F. 98-99). When Kilpatrick told them that he had obtained a contract to pursue a medical malpractice claim, Mr. Dodd informed Kilpatrick at that time that Bill Camp was not mentally competent to make a contract, that Susie Camp had been appointed as Bill's guardian, and that the family was already looking into finding an attorney. (S.F. 115-116).

On July 20 1989, Kilpatrick telephoned Susie Camp at her home and told her that Bill had retained

him. Susie Camp informed Kilpatrick that she was Bill's temporary guardian and that Kilpatrick did not have her authorization to proceed with a lawsuit or take any action on behalf of Bill Camp. (S.F. 130-131). Yet, even after this information was given to him, Kilpatrick associated the law firm of Hornbuckle and Montgomery to file a lawsuit in District Court in Harris County the very next day, naming Bill Camp as Plaintiff. (Pet. Ex. 2).

Given this, on October 6, 1989, Robert S. MacIntyre, Jr., an attorney representing Susie Camp, sent Kilpatrick a letter which requested Kilpatrick relinquish the "contract" he had obtained. (Pet.

Ex. 3; S.F. 185-186). Kilpatrick responded by letter dated October 10, 1989, claiming that he had suffered damages due to the interference of the family with his "contract" and offering to surrender the "contract" and claims of interference for $277,000.00. (Pet. Ex. 4).

Because of Kilpatrick's refusal to give up his claim to Bill's case, Susie Camp was hampered in her ability to find and retain a competent attorney to handle the malpractice claim. (S.F. 135). Ms. Camp was ultimately forced to take Kilpatrick to court to have the Power of Attorney declared void and get a court order declaring Kilpatrick had no autority to

represent either Bill Camp or his guardian. (Pet. Ex. 5).

However, even after the Court declared Kilpatrick's contract void, he continued to attempt to extract $277,000.00 by threatening to file a motion to recuse the probate court judge unless this amount of money was paid. (S.F. 196).

The State Bar of Texas filed a disciplinary lawsuit against Kilpatrick alleging specific acts of misconduct. (T. 17). The case was tried to a jury before the Honorable Leonard E. Hoffman, Jr. The jury returned a verdict in favor of the State Bar which found:

> **That Donald E. Kilpatrick did initiate contact with Bill Camp as a prospective client for the purpose of obtaining professional employment when he knew or reasonably should have**

known that Bill Camp could not exercise reasonable judgment in employing a lawyer.

That Donald E. Kilpatrick engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in obtaining the signature of Bill Camp on a power of attorney employing him as an attorney to prosecute a medical malpractice claim.

That Donald E. Kilpatrick engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in asserting that Bill Camp was competent to enter into a contract.

That Donald E. Kilpatrick engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in associating other attorneys to file a lawsuit on behalf of Bill Camp after being advised that Bill Camp was the subject of a temporary guardianship.

That Donald E. Kilpatrick engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in requesting payment of $277,000.00 to relinquish his claims under the contract signed by Bill Camp.

That Donald E. Kilpatrick did with intent to obtain an

> **economic benefit for himself, solicit employment for himself to prosecute a suit or to collect a claim.** (T. 5).

Based on these answers, the trial court found that Kilpatrick had violated the following Disciplinary Rules:

DR 1-102(A)(1): [a lawyer shall not violate a disciplinary rule].

DR 1-102(A)(4): [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation].

DR 1-102(A)(5): [a lawyer shall not engage in conduct that is prejudicial to the administration of justice].

DR 1-102(A)(6): [a lawyer shall not engage in conduct that adversely reflects on his fitness to practice law].

DR 2-103(D)(1): [a lawyer shall not initiate contact with a prospective client for the purpose of obtaining professional employment].

Article X, Section 7(5) State Bar Rules: [engaging in conduct which constitutes barratry as defined by the law of this state].

Article X, Section 7(1) State Bar Rules: [acts or omissions by a lawyer, individually or in concert with another person or persons, which violate the Texas Code of Professional Responsibility, whether or not the acts or omissions occurred in the course of a lawyer-client relationship].

The trial court entered a judgment of disbarment against

Kilpatrick. The Court of Appeals for the Fourteenth District of Texas reversed the judgment of the trial court (See P. 19 of Appendix to Kilpatrick's Petition for Writ of Certiorari).

The Supreme Court of Texas reversed the judgment of the court of appeals and affirmed the disbarment of Kilpatrick from the practice of law. (See App. 1-19).

OBJECTION TO JURISDICTION

The Petition for Writ of Certiorari should be denied as Petitioner, Donald E. Kilpatrick ("Kilpatrick"), has failed to establish jurisdiction in accordance with either Rule 10.1(a) or 10.1(b) of the Rules of the Supreme Court of the United States or with 28 U.S.C.

§ 1257. No federal question was decided by the state court of last resort. The only issues before and addressed by the Texas Supreme Court involved the propriety of the trial court in allowing a trial amendment and a review of the discipline imposed. (App. 1-18).

Nor does the case involve the validity of a State statute in connection with the Constitution of the United States. Kilpatrick cites Disciplinary Rule 2-103(A) as a statute involved in this case. DR 2-103(A) was never at issue at any point in the disciplinary proceedings and consequently is of no relevance in the proceeding before this Court. Kilpatrick was

not found to have violated DR 2-103(A). Rather, the trial court entered a finding of professional misconduct based upon DR 2-103(D). Kilpatrick also cites Canon 7 or EC 7-1 as "statutes" involved in this case. Neither Canon 7 nor EC 7-1 are statutes and neither was ever addressed by any court in any context.

While couched in terms of constitutional deprivations, a review of Kilpatrick's "Questions Presented" reveals nothing more than Kilpatrick's dissatisfaction with the outcome of his jury trial for professional misconduct and is an attempt by him to relitigate his disciplinary case.

His "Questions" regarding the appointment of a National Committee to look into bar association practices and pro bono services are entirely inappropriate matters for this Court to consider and certainly were not matters raised before any State Court.

Therefore, this Court should deny Kilpatrick's petition for lack of jurisdiction.

ARGUMENT AND AUTHORITIES

Although Kilpatrick's arguments are couched in terms of "national importance," "arbitrary and discriminatory practices," and "state court's constitutional infirmities," what Kilpatrick truly seeks is another forum in which to relitigate the disciplinary

proceeding which led to his disbarment. This is clear from a review of his Petition. His Petition is fraught with a rehash of his arguments made in the Texas courts with respect to his perception of the insufficiency of the evidence to support the jury's findings. He complains that the "trial court's determinations are not supported by the record" and that "there is no evidence that Petitioner engaged in dishonesty, fraud, deceit, or misrepresentation" in violation of DR's 1-102(A)(4), 1-102(A)(5) or DR's 1-102(A)(6). (See p. 25 of Petition).

He also seeks another forum in which to complain of the trial court's rulings on evidentiary and

procedural matters. He complains of the "the cumulative effect of various trial court overruling of Petitioner's objections" such as its ruling on a trial amendment and the submission of the charge to the jury (See. p. 14 of Petition). His alleged complaint concerning the trial court's ruling with respect to a trial amendment allowed at his disciplinary proceeding involves nothing more than the application of Texas Civil Procedure and was accurately and succinctly addressed by the Texas Supreme Court.

Contrary to Kilpatrick's assertions, the trial court's ruling on the trial amendment does not involve the application of *In Re Ruffalo, 390 U.S. 544, 88 S. Ct.*

122, 20 L. Ed. 2d 177 (1968). The trial amendment allowed in Kilpatrick's disciplinary proceeding did not add a new cause of action. It merely added an allegation under a different subdivision of the same article and section of the disciplinary rules. Furthermore, Kilpatrick did not raise his due process claims before any of the lower courts and neither court addrssed such an issue.

Further evidence of his desire for a new trial are his complaints that the Texas Supreme Court violated his rights in "misstating true facts" and his persistence in seeking a review of the discipline imposed by the trial court. (See P. 26 of Petition).

In his attempt to involve this Court in a relitigation of his disciplinary case, Kilpatrick frames his issues as those involving discriminatory practices of the State Bar of Texas. The State Bar of Texas in carrying out its duties and responsibilities to the Texas Supreme Court in regulating the practice of law brought the lawsuit against Kilpatrick for allegations of professional misconduct. The disciplinary proceeding itself was tried to a jury and it was the jury who made the findings and rendered the verdict regarding Kilpatrick's misconduct. On the basis of the jury verdict, the trial court found violations of the Code of

Professional Responsibility and entered a judgment of disbarment. Thus, this case does not involved any "practices" of the State Bar of Texas.

Finally, Kilpatrick's attempt to invoke *In Re Primus, 436 U.S. 422 (1978)* into this this case is completely meritless. Once again, Kilpatrick is simply rearguing what his perception was of the evidence at trial and wholly disregards the jury's finding that he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in requesting payment of $277,000.00 to relinquish his claims under the contract signed by Bill Camp.

SUMMARY AND CONCLUSION

Kilpatrick has failed to properly invoke jurisdiction of this Honorable Court as no federal question was decided by a state court of last resort. His Petition amounts to nothing more than an attempt to retry the disciplinary lawsuit which led to his disbarment.

PRAYER

WHEREFORE, PREMISES, ARGUMENTS AND AUTHORITIES CONSIDERED, Respondent prays that Petitioner's Petition for Writ of Certiorari be denied and for such other and further relief as this Court may deem proper.

Respectfully submitted,

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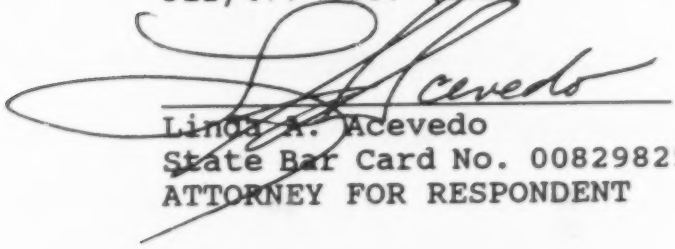
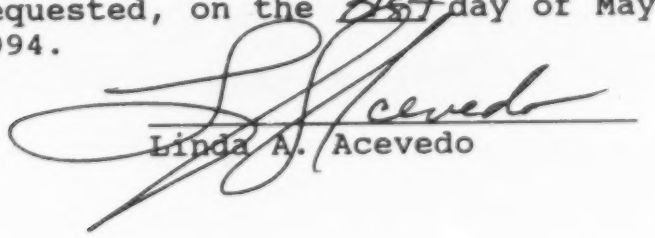


Linda A. Acevedo
State Bar Card No. 00829825
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Brief of Respondent has been served on Donald E. Kilpatrick, at 2723 Triway Lane, Houston, Texas 77043, by delivery of true and correct copies to him by certified mail, return receipt requested, on the 31st day of May, 1994.



Linda A. Acevedo

APPENDIX

IN THE SUPREME COURT OF TEXAS

No. D-4055

The State Bar of Texas, Petitioner

v.

Donald E. Kilpatrick, Respondent

On Application for Writ of Error to the Court of Appeals for the Fourteenth District of Texas

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PER CURIAM

In this disciplinary proceeding, the court of appeals reversed and remanded the trial court's order disbarring Donald Kilpatrick for soliciting employment in violation of State Bar disciplinary rules. We reverse the judgment of the court of appeals, and render judgment disbarring Kilpatrick.

Bill Camp, a Houston attorney, suffered brain damage during a routine medical procedure on June 13, 1989. A week later, on June 20, his wife was appointed as his temporary guardian. On September 1, 1989, she became his permanent guardian.

Kilpatrick visited Camp at the Texas Institute for Research and rehabilitation on July 19, 1989. During this meeting, Kilpatrick obtained Camp's signature on a power of attorney, which purported to authorize Kilpatrick to represent Camp in a medical malpractice claim. Only Kilpatrick and Camp were present, and neither Camp, his family, nor any legal representative requested or authorized Kilpatrick's

visit. Kilpatrick later testified he knew Camp only as a "brother in the bar," that they had not been close friends or socialized together, and that their only previous acquaintance had been as opposing counsel on some criminal cases. He said that he had heard of Camp's misfortune through a law firm that, in turn, had learned the news from the emergency room physician on duty at the time of Camp's injury. Kilpatrick learned of Camp's location by calling Camp's office.

On July 21, 1989, two days after Kilpatrick obtained Camp's signature, Hornbuckle & Montgomery, the firm that had contacted Kilpatrick, filed a malpractice lawsuit against the doctors who

treated Camp. When Ms. Camp learned of Kilpatrick's actions, she told Kilpatrick that the power of attorney was invalid, that she was Camp's guardian, and that Bill Camp was in no condition to retain a lawyer. Ms. Camp also hired a probate lawyer, Robert McIntyre, to assist her with the guardianship.

At Ms. Camp's behest, McIntyre went to Kilpatrick's office and demanded that Kilpatrick relinquish any claim to represent Camp under the power of attorney. Kilpatrick refused, and insisted on a referral fee. When McIntyre repeated his demand to Kilpatrick in a letter dated October 6, 1989, Kilpatrick demanded $277,000.00 in exchange for his release.

As guardian, Ms. Camp filed a Tex. R. Civ. P. 12 Motion for Attorney to Show Authority with the probate court concerning Kilpatrick's power of attorney. On November 17, 1989, the probate court determined that Camp was mentally incompetent on the date he signed the power of attorney, and that Kilpatrick had no authority to represent him.[1] The probate court also directed Kilpatrick to reimburse Ms. Camp for the attorneys' fees she had incurred as a result of his actions. On December 8, 1989, the same day the court issued its order, Kilpatrick

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[1]Some time after the court held Kilpatrick was disqualified, Ms. Camp retained Richard Mithoff to handle the malpractice claim. Mithoff eventually reached a settlement with Camp's doctors.

appeared at McIntyre's office with an unfiled Motion to Recuse the probate judge. Kilpatrick threatened to file the motion unless Ms. Camp paid him the requested referral fee.

In April 1991, the State Bar filed a disciplinary action against Kilpatrick, charging him with violations of five disciplinary rules. At trial, the jury found that Kilpatrick (1) initiated contact with a prospective client for the purpose of obtaining employment, (2) engaged in conduct involving dishonesty, deceit, or misrepresentation, and (3) with intent to obtain an economic benefit to himself, solicited employment for himself to prosecute or collect a

claim. On March 13, the trial court rendered judgment on the verdict, disbarring Kilpatrick.

The court of appeals reversed the trial court's judgment and remanded for new trial on two grounds. ____ S.W.2d ____. First, the court of appeals held that the trial court had erroneously permitted the State Bar to amend its pleadings at trial to include an allegation of barratry. *Id.* at ___. Second, the court held that the trial court abused its discretion in ordering disbarment based on a single act of solicitation. *Id.* at ___. We disagree with the court of appeals on both counts.

The State Bar's expert witness, Fred Hagans, testified on the issue

of barratry, first during cross-examination by Kilpatrick's attorney, and then on redirect examination. At the subsequent charge conference, the State Bar requested a trial amendment alleging barratry as defined in Tex. Penal Code Ann. § 38.12(a) (Vernon Supp. 1993), *reprinted in* Tex. Penal Code Ann. § 38.12 note (Vernon Sup. 1994) (Historical and Statutory Notes), *amended by* Tex. Penal Code Ann. § 38.12(a) (Vernon Supp. 1994). Over Kilpatrick's objection, the trial court permitted the trial amendment, and included the issue in the charge.

If evidence is objected to at trial on the ground that it is not within the issues made by the

pleadings, the court *may* allow the pleadings to be amended and *shall* do so freely when the presentation of the merits will be subserved thereby and the objecting party failed to satisfy the court that the amendment would prejudice that party in maintaining the action or defense on the merits. Tex. R. Civ. P. 66 (emphasis supplied). A court may not refuse a trial amendment unless (1) the opposing party presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face. *Greenhalgh v. Service Lloyds Ins. Co.*, S.W.2d 938, 939 (Tex. 1990). The burden of showing surprise or prejudice rests on the party

resisting the amendment. *Id.* If the trial amendment is not mandatory, then the decision to permit or deny the amendment rests within the sound discretion of the trial court. Tex. R. Civ. P. 66: *Greenhalgh,* 787 S.W.2d 939. In such a case, the court's decision to allow or deny a trial amendment may be reversed only if it is a clear abuse of discretion. *Hardin v. Hardin,* 597 S.W.2d 347, 349-50 (Tex. 1980).

The court of appeals held that the trial amendment alleging barratry was "prejudicial on its face" because it added a new cause of action. ____ S.W.2d at ___. In so doing the court of appeals effectively held that all

nonmandatory trial amendments under Rule 66 must be rejected. To the contrary, we hold that the decision to grant or deny the trial amendment was discretionary, and under the circumstances the trial court did not abuse that discretion.

The trial amendment added an additional cause of action to the extent it alleged another ground of attorney misconduct under former Article X, Section 7 of the State Bar Rules. *See also* Gov't Code Ann., Tit. 2, Subtit. G, App. A-1 (Vernon Supp. 1994) (current version of same rule). The initial pleadings alleged multiple forms of attorney misconduct in violation of State Bar Rules, Art. X, § 7(1), which is a general prohibition

concerning acts or omissions that violate the Texas Code of Professional Responsibility. The trial amendment added an allegation under a different subdivision of the same article and section of the disciplinary rules. State Bar Rules, Art. X, § 7(5) ("engaging in conduct that constitutes barratry as defined by [Tex. Penal Code Ann. § 38.12(a) (Vernon Supp. 1993)"]. *See also* Tex. R. Disciplinary P. 1.06(Q)(5) (1992) (current version).

The central allegation in the State Bar's initial complaint was that Kilpatrick violated former Tex. Code Professional Responsibility DR 2-103(D)(1), which prohibited attorneys from initiating contact with prospective clients for the

purpose of obtaining employment if the lawyer knew or reasonably should have known the person could not have exercised reasonable judgment in employing a lawyer. *See also*, Tex. Disciplinary R. Prof. Conduct 7.02 (1989), *reprinted in* Tex. Gov't Code Ann., Tit. 2, Subtit. G, App. A (Vernon Supp. 1994) (State Bar Rules, Art. X, § 9). Former DR 2-103(D)(1) shares common elements with the criminal offense of barratry,[2] and the evidence presented at trial supported discipline under either theory. Thus, the trial court, in its

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[2]Barratry is the solicitation of employment to prosecute or defend a claim with intent to obtain a personal benefit. Tex. Penal Code Ann, § 38.12(a)(3) (Vernon Supp. 1993), *amended by* Tex. Penal Code Ann. § 38.12(a) (Vernon Supp. 1994).

discretion, could reasonably have concluded that the trial amendment did not impair Kilpatrick's ability to present his defense. We therefore hold that the trial amendment did not involve the kind of calculated surprise or unfair prejudice that would render it an abuse of discretion.

The court of appeals further based its reversal of barratry in criminal proceedings: "[T]here was no criminal prosecution, yet, the State Bar obtained a finding of criminal wrongdoing without the hardship of the higher burden of proof which is necessary for a conviction." ____ S.W.2d at ____. The court of appeals erred, however, in its assumption that an attorney

may not be disciplined for barratry in civil proceedings without first being convicted in criminal proceedings. While barratry is a crime for which an attorney may be prosecuted, a criminal prosecution is not a prerequisite to disciplinary proceedings based on that offense. Tex. Gov't Code Ann. § 82.062 (Vernon 1988) ("Any attorney who is guilty of barratry . . . may be [disciplined] . . . regardless of whether the attorney is being prosecuted for, or has been convicted of the offense."). Thus we hold that the trial amendment resulted in no unfair prejudice, and was clearly within the trial court's discretion.

The court of appeals also concluded that the trial court's judgment should be reversed because the sanction of disbarment was so disproportionate to Kilpatrick's misconduct that it constituted an abuse of discretion. ___ S.W.2d at ___. We disagree.

The court of appeals characterized Kilpatrick's misconduct as an "isolated act of solicitation." Comparing it to other reported disciplinary cases in which the attorney misconduct "was much more egregious but in which the appellate court approved lesser sanctions," the court concluded that the sanction of disbarment was "so heavy" as be an abuse of discretion. ___ S.W.2d at ___.

The judgment of a trial court in a disciplinary proceeding may be so light, or so heavy, as to constitute an abuse of discretion. *See State v. Ingram*, 511 S.W.2d 252, 253 (Tex. 1974). At the same time, the trial court has broad discretion to determine whether an attorney guilty of professional misconduct should be reprimanded, suspended, or disbarred. *Id.; State v. O'Dowd*, 312 S.W.2d 217, 221 (Tex. 1958). In determining the appropriate sanction for attorney misconduct, a trial court must consider the nature and degree of the professional misconduct, the seriousness of and circumstances surrounding the misconduct, the loss or damage to clients, the damage to the

profession, the assurance that those who seek legal services in the future will be insulated from the type of misconduct found, the profit to the attorney, the avoidance of repetition, the deterrent effect on others, the maintenance of respect for the legal profession, the trial of the case, and other relevant evidence concerning the attorney's personal and professional background. Tex. R. Disciplinary P. 3.10 (1992). The court may, in its discretion, hold a separate evidentiary hearing and take evidence on these issues. *Id.*

The sanction of disbarment does not turn on whether an attorney has engaged in a single act, as opposed to repeated and systematic pattern,

of misconduct. Under Disciplinary Rule 3.10, a multitude of factors must be considered. In light of the facts and circumstances presented, we cannot say that the trial court abused its discretion, and we disagree with the court of appeals that the sanction of disbarment is disproportionate to Kilpatrick's misconduct.

We therefore grant the application of the State Bar and, without hearing argument, a majority of the court reverses the judgment of the court of appeals, and renders judgment disbarring Kilpatrick. Tex. R. App. P.170.

Opinion Delivered: January 5, 1994.